Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals, by upholding a race conscious affirmative action plan that has been ongoing since 1987 within all ranks of the Chicago Fire Department ("CFD"), vitiated the demands of narrow tailoring because the affirmative action plan is not ephemeral since it continues with no realistic stopping point, notwithstanding the City's adherence to consent decrees resulting in nearly 20 years of non-discriminatory hiring conditions, and after its adherence to a consent decree resulting in a decade's worth of validated promotional exams?

2. Whether the court of appeals ignored the constitutional standard of narrow tailoring by measuring the duration of CFD minority promotional preferences to litigation oriented numerical goals that are unattainable because they are based on unrealistic assumptions that have no connection to hiring experiences in the CFD under non-discriminatory condition?

LIST OF PARTIES TO THE PROCEEDING

Petitioners:

Chicago Fire Fighters Union Local No. 2, Timothy A. Andersen, Larry W. Anoman, Robert Anthony, Keith Bozenda, John Brennan, Patrick Brennen, Raymond Bronke, Edward Budill, James Byrne, Edward Carone, Wayne Carter, Joseph Christensen, James M. Clarke, James P. Clarke, John M. Craven, Daniel DeGryse, Edward Doherty, Richard Drezek, Tedmund Duber, Peter Eck, James W. Fisher, John Fitzgerald, John Fleischhacker, John Floodas, Robert Gallapo, Martin F. Gaughin, William Gavin, John Gilmartin, Kenneth Graham, Robert Griffin, Anthony Gumpert, Richard Gustafson, Tom Gustafson, Gerald Hamburg, James Hammon, Jeffrey Heinz, Robert Hoehn, Martin Holland, James Holtz, Donald Hroma, Nicholas Infante, Herbert Johnson, Robert Jurewicz, Michael J. Kammerer, Raymond Kappel, Jr., John F. Kelly, Kevin Kennelly, Joseph Lambert, Daniel Leland, Todd A. Lewandowski, Glen Lyman, Scott Malito, John T. Marolda, Guy McAndrew, Francis McCann, John F. McDonaugh, John McErlean, William McGrane, Kevin McKendry, Brian McMahon, Ralph McMullen, Ronald Michi, Albert W. Mirza, Robert Molinari, Robert S. Muir, James Mungovan, Joseph Muscolino, Kenneth Nasadowski, Michael Norris, Daniel O'Connell, Eamonn O'Connell, James O'Donnell, John O'Hara, Michael Oliver, Mark Owsianiak, Stan Pavilonis, Gerald Peck, Robert Pillon, Jr., Edward A. Porter, Edward Ruder, George Ryback, James Soludczyk, Michael Spangelo, Warren Stahmer, Patrick Sweeney, Richard Temple, Victor Walchuk, Thomas Welch, and Terrance Whirity.

Respondent:

City of Chicago.

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OPINIONS BELOW

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Chicago Fire Fighters Union Local No. 2 v. City of Chicago*, 249 F.3d 649 (7th Cir. 5/3/01), opinion amended on May 25, 2001. Judge Posner wrote the opinion, joined by Judges Coffey and Ripple. The opinion is reproduced in Petitioners' Appendix ("Pet. App." 1a-13a).

The judgment of the district court (Holderman, J.), affirmed by the court of appeals, is not officially reported, 1999 U.S. Dist. LEXIS 20310 (N.D. Ill. 1999); the trial court's memorandum opinion, along with findings of fact and conclusions of law, appears at Pet. App. 14a-181a.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on May 3, 2001. Petitioners' timely motion for rehearing was denied on May 31, 2001. This petition has been duly filed within 90 days of May 31, 2001, the date of the court of appeals' denial of the petition for rehearing.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution provides:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981 provides:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes licenses, and exactions of every kind, and to no other.
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the Unites States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in an action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners are Chicago Fire Fighters Union Local No. 2, along with 91 of the union's members (who are white). The individual petitioners' promotions to one of four ranks within

the Chicago Fire Department ("CFD"), were, at various times over the course of a decade, postponed by respondent, City of Chicago; respondent "passed-over" petitioners in order to promote blacks and Hispanics, although the latter had attained lower scores than petitioners on any one of six validated promotion exams. The lengthy bench trial in the district court covered five separate actions, each of which challenged respondent's affirmative action promotions. The earliest of those cases was filed in 1987, and the latest in 1996.[1] In each case jurisdiction in the district court was based on 28 U.S.C. § 1331.

The district court issued its memorandum opinion on December 30, 1999, and upheld as constitutional all affirmative action promotions in the CFD—224 in number—made by respondent between August 16, 1987 through January 1, 1997. Pet. App 22a-23a. By the time the district court issued its decision the related case of *McNamara v. City of Chicago*, 138 F.3d 1219 (7th Cir.) (Pet. App. 182a-192a) *cert. denied*, 525 U.S. 981 (1998), had already been decided. The court of appeals in *McNamara* held that because of "proof . . . that the City engaged in racial and ethnic discrimination in the employment of firefighters in the past," Pet. App. 186a, 189a, there was a compelling interest to award affirmative action promotions based on the results of the 1987 captains' examination:

> There was also direct evidence of racial discrimination in the Chicago Fire Department up to and into the 1980s, much of it concerning the racial policies of senior officials of the department, including one Fire Commissioner . . . * * * [T]he people running the fire

[1] The district court granted summary judgment to respondent in the original case, *Chicago Fire Fighters Union v. Washington*, 736 F.Supp. 923 (N.D.Ill. 1990), *aff'd*, 962 F.2d 1269 (7th Cir. 1992), *rev'd sub nom. Billish v. City of Chicago*, 989 F.2d 890 (7th Cir.) (*en banc*), *cert. denied*, 510 U.S. 408 (1993). The five lawsuits were formally consolidated by the court of appeals in 2000. Pet. App. 1a.

> department endeavored with considerable success to make the department uncongenial to blacks and Hispanics. Pet. App. 189a.

In ruling against petitioners, the district court adopted *McNamara's* compelling interest findings. Pet. App. 122a.

Petitioners appealed, with appellate jurisdiction conferred by 28 U.S.C. § 1291. On appeal, petitioners did not contest the trial court's finding of past intentional discrimination. Pet. App. 2a. Rather, petitioners confined their arguments on appeal to the narrow tailoring prong of strict scrutiny: particularly, whether respondent's affirmative action program exceeded durational limits because the stopping point to end preferences has been attained. In *McNamara,* the court of appeals held that the "test" for measuring the remedial extent of affirmative action is a quantity expressed as a "plausible lower bound estimate." Pet. App. 190. Although the census based proportional hire and promotion model developed by the City's statistician in *McNamara* postulated that as of 1992 the rank of CFD lieutenant—the "potential applicant pool" for captains—would have been 43% minority, Pet. App. 148a, the Seventh Circuit accepted a two-thirds discount, explaining that "had it not been for the City's discrimination against blacks and Hispanics in the past, the percentage of black and Hispanic captains would be at least a third [14.4%] of the potential applicant pool [43%]." Pet. App. 191.

In petitioners' case, however, the district court discounted the proportional hiring model by 28%, and held that in the absence of discrimination the plausible lower-bound estimate for minority captains in 1992 would have been 27%, Pet. App. 169a, and not the lower bound estimate of 14.4% approved by the court of appeals in *McNamara.* The district court applied a similar 28% discount for the other three promotional ranks. By way of example, applying the 28% discount to the rank of engineer, "the lowest expected minority percentage" would have been 32.64%; but since the actual minority proportion of engineers stood at 32.4%, or

2/10th% below the "expected" percentage, the district court held that affirmative action could continue until that "slight[]" gap was bridged, and only then would affirmative action have to cease in the engineer rank. Pet. App. 176a, 180a.

In an about-face the court of appeals completely shunned the two-thirds discounted plausible lower bound estimate formula it had approved in *McNamara*.[2] Had a two-thirds discount been applied, a remedy for past discrimination was already achieved in three of the four CFD promotional ranks—engineer, lieutenant, captain (but not the highest rank of battalion chief)—by the early 1990s. Nor was the district court's 28% discount, which it used to calculate the plausible lower bound estimate, Pet. App. 138a, 169a, 176a, endorsed by the court of appeals. Instead, the court of appeals substituted the proportional hire and promotion model, advocated by respondent's expert. That model used Chicago's general population census, weighted for each year since 1950 and adjusted for age and gender, Pet. App. 136a-37a, 140a, as the relevant labor pool to determine what the minority composition of the CFD's promotional ranks would have looked like between 1987 and 1997, had there not been past intentional discrimination. Pet. App. 2a-3a, 7a-8a.

The court of appeals' holding merits this Court's review; the decision below is a never-ending prescription for preferential treatment of minorities, and that proposition is

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[2] In *Majeske v. City of Chicago*, 218 F.3d 816 (7th Cir. 2000), decided shortly after *McNamara*, the court also approved a two-thirds discount to calculate the shortfall of black detectives in the Chicago Police Department: the court held that 75 black detectives—one-third of the "expected" 221 predicted by a proportional hiring model—was a "reasonable low-end estimate" of the number of blacks "affected by past discrimination." 218 F.3d at 822. Although the "plausible lower bound" test has been criticized as a break from this Court's demanding test of strict scrutiny, *see*, fn. 6, *infra.*, a two-thirds discount for all practical purposes, would have meant that the stopping point for affirmative action in petitioners' case had been attained in the early 1990s.

one that holds no sway with this Court. *See, e.g., U.S. v. Paradise*, 480 U.S. 149, 171, 177 (1987).

Salient facts regarding this question follow:

1. Since 1980, promotions in the CFD have been subject to a consent decree between respondent and the Department of Justice. Pet. App. 135a. The promotional quotas imposed by that consent decree were already satisfied when, in 1987, respondent initiated the first of the voluntary affirmative action promotions—to the ranks of engineer and captain—that are involved in this Petition. *Billish v. City of Chicago, supra,* 989 F.2d at 893-94; Pet. App. 30a-33a, 42a-44a. As required by the promotion consent decree, the six CFD promotion exams in question were developed consistent with the Federal Uniform Guidelines on Employee Selection, with respondent utilizing content validation techniques for test development. Pet. App. 2a, 24a-25a, 39a-40a, 68a-69a, 101a-103a.

2. The written announcements that have preceded each series of affirmative action promotions since 1987 have included language that respondent's "policy will apply only for the anticipated three year life of [a particular rank's promotional] eligibility list." Def. Ex. (DX), 1-3, 4-1, 5-2, 6-2. However, neither the official responsible for the inclusion of the three year limit in the 1987 affirmative action announcement, nor respondent's personnel commissioner, under whose authority each announcement was issued, had an understanding about how long respondent intended to award affirmative action promotions—other than knowing that affirmative action would last longer than three years. Tr. 2452-55, 2627-28; Carr Dep. 32, 34, 37-8, 55-6, 62.

3. In granting summary judgment to respondent in 1990, the district court held that affirmative action promotions to engineer and captain were narrowly tailored because it was "uncontested" that these promotions were to be of "limited

duration," with the court accepting respondent's representation that "the City will eliminate the goals after three years . . ." *Chicago Fire Fighters Union Local No. 2 v. Washington*, 736 F.Supp. 923, 932 (N.D.Ill. 1990), *rev.'d on other grnds., Billish v. City of Chicago* (*en banc*), *supra.*

4. But no sooner had respondent made the final set of affirmative action promotions from the 1987 captain promotional list on April 1, 1992, than it immediately resumed making promotions justified on affirmative action grounds from the new captain promotional list. Pet. App. 43a-45a 60a-61a. So by the time of trial, affirmative action promotions to captain had been ongoing for 9 ½ consecutive years. And after awarding 58 affirmative action promotions during the eight year life of the1985 engineer list, Pet. App. 30a-33a, respondent made an additional 53 affirmative action promotions between December 1994 and March 1997 from the new engineer promotional list. By the conclusion of trial in January 1998 race-based promotions to engineer were still ongoing nearly 11 years after they began. Pet. App. 107a-109a, 176a. Similarly, affirmative action promotions to lieutenant were still ongoing at the conclusion of trial, nearly 1½ years beyond the date when respondent "anticipated" its affirmative action policy would no longer apply. Pet. App. 73a-75a, 172a-173a.

5. Between 1977 and June 1995, hiring into the CFD was governed by three fire-fighter entrance examinations, and these examinations and the hiring process in general were also subject to consent decrees with the Department of Justice. Pet. App. 23a. When these consent decrees took effect in "1974, only 4 percent of the firefighting force was black and only one-half of 1 percent was Hispanic . . ." Pet. App. 187a. The entrance exams given by respondent under the hiring consent decrees "involved a pass-fail written test of reading comprehension and a physical fitness test," Pet. App. 23a, because those decrees prohibited use of a "written

firefighter entrance examination of the type given by the City in 1968." Jt. Ex (JX) H-7 at 4. By 1996, the last full year before the hiring consent decrees were vacated, blacks represented 21.25% of the CFD and the Hispanic component was 7.8%. Pet. App. 150a-152a. CFD hiring between 1977 and mid-1995 was conducted under race neutral conditions. Pet. App. 137-38a; Tr. 988, 1041-42, 1150-51, 1155; City's Response to Plaintiffs' Conclusions of Law No. 64; City's Brief on Appeal at 41.

6. By virtue of the court of appeals' decision, with its endorsement of a census based proportional hire and promotion model, Pet. App. 3a-6a, affirmative action promotions continue today in all CFD ranks nearly 15 years after the onset of that policy. Based on the assumption that new hires should have matched Chicago's racial makeup—i.e., the census based proportional hire model eventually accepted by the court of appeals—respondent's expert predicted it would still take another 10 or 15 years of affirmative action (until the years 2010 or 2015) before the racial composition of the CFD reflected the racial composition of Chicago. DX17-1 at 16-17.[3] But the proportional hire assumption proved to be quite unrealistic: between 1985 and 1993, when CFD hiring occurred in a race neutral environment in accordance with hiring consent decrees, the combined black and Hispanic hiring rate was approximately 41%, DX 17-11, whereas respondent's expert, relying on the census based proportional hire model,

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[3] Respondent originally used a census based model when affirmative action promotions began in 1987, but the district court's grant of summary judgment in 1990 was predicated on respondent's timely switch to a statistical approach that compared "the percentage of minorities in a particular rank of the CFD and the rank immediately below." *Chicago Fire Fighters v. Washington, supra.*, 736 F.Supp. at 929-30. Subsequent affirmative action announcements have relied on these inter-rank disparities. DX 5-2, 6-2.

predicted that 57% of new hires would be black and Hispanic. Pet. App. 136a-138a.[4]

7. Respondent administered another entrance exam in 1995. Before respondent could conduct the 1995 entrance exam, the hiring consent decrees in effect since 1974 had to be set-aside because the 1995 entrance exam required applicants to have a high school degree, Pltfs. Ex. (PX) 15-16, and that exam was also designed to be a better gauge of cognitive skills than the consent decrees permitted—which limited the failure rate on reading comprehension tests to 6% of applicants. PX 19A at 18; Tr. 2289-90. Respondent's purpose in seeking to vacate those consent decrees was a desire to give a new exam that would "actually have some relatedness to the job," with the goal of producing "a good and effective Firefighter rank." PX 19A at 18.[5] The district court in *United States of America v. City of Chicago, et al.*, 73 C 661 (N.D.Ill. Alesia, J), with the concurrence of respondent and the Department of Justice, vacated the 1970s era hiring consent decrees, and nearly 25,000 applicants sat for the 1995 exam. DX17-11.

8. Minorities fared poorly on the 1995 entrance exam: not only was the white pass rate 97%, compared to black and Hispanic pass rates of 54% and 66%, respectively, Pet. App. 5a, but whites will account for approximately 80% and minorities 20% among the 1,000 firefighters respondent projected would be hired based on the scores on the 1995 entrance exam. Tr. 1156, 2412, 2911-12, 2918, 2929, 3766,

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[4] The percentage difference between 57% and 41% became the 28% discount, and is referred to by the district court as the "sustainable hire rate." Pet. App. 136a-138a, 142a.

[5] These representations were subject to judicial notice in the courts below, pursuant to Rule 201(b)(2), Federal Rules of Evidence. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 157 (1969) ("we may properly take judicial notice of the record in . . . litigation between the same parties who are now before us.").

3856. Consequently, based on the results of the 1995 exam, minority hiring will show a shortfall of 66% (20% hiring rate falling 66% below the minority application rate of 60.17%). A Title VII lawsuit, challenging the 1995 entrance exam on a disparate impact theory, is pending in the United States District Court for the Northern District of Illinois. *See, In re Arthur L. Lewis, Jr.*, 212 F.3d 980 (7th Cir. 2000).

9. Although all components of the CFD hiring process during the consent decree era ('77-mid'95) and under the 1995 exam have been free of intentional discrimination, these race neutral conditions have not resulted in proportional hiring.

10. Just as the court of appeals deviated from the requirements of strict scrutiny when it approved an affirmative action program that is of unlimited duration, the court of appeals also departed from the narrow tailoring prong of strict scrutiny when it approved an affirmative action program that has no rational relationship to norms of proportionality.

11. The decision below creates a direct conflict with the teachings of this Court, and with decisions of other courts of appeals as well. Because of the nationwide controversy that surrounds the presumptively suspect area of affirmative action, *City of Richmond v. J.A. Croson,* 488 U.S. 469, 493 (1989), this Court, from *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978) through *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), has entered the fray to set strict constitutional limitations—limitations that the lower court's decision would trump.[6] Accordingly,

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[6] In his approach to narrow tailoring in the related case of *McNamara v. City of Chicago, supra.*, Judge Posner—also the author of the decision herein—has come in for criticism both from commentators who favored and opposed the outcome in *McNamara.* As to the former, *see*, Day, *Retelling the Story of Affirmative Action*, 89 Cal. L. Rev. 59, 92-93 n. 116 (2001) ("the implications of Judge Posner's novel approach [to narrow

petitioners now petition this Court for a writ of certiorari to review the decision of the Seventh Circuit entered on May 3, 2001, as amended on May 25, 2001.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW VITIATES THE NARROWLY TAILORED PRONG OF STRICT SCRUTINY BY ALLOWING AFFIRMATIVE ACTION TO CONTINUE FOR AN UNLIMITED DURATION.

A. The Decision Below Approving Of An Affirmative Action Plan That Is Not Ephemeral And Continues After More Than A Decade's Worth of Validated Exams Conflicts With *Paradise*.

In *U.S. v. Paradise*, 480 U. S. at 171, Justice Brennan's plurality opinion sketched out the elements of narrow tailoring in the context of affirmative action:

> In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; *the flexibility and duration of the relief*, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties. (Italics added.)

Elaborating on the duration factor, the opinion described as "[m]ost significant[]" the "ephemeral" quality of the 50% promotion quota, which "endures only until the Department comes up with a procedure that does not have a discriminatory impact on blacks . . ." *id.*, at 178.

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tailoring] are difficult to determine . . ."), and as to the latter, *see*, *Recent Cases*, 112 Harv. L. Rev. 560, 562, 565 (1998) (". . . Judge Posner's 'plausible lower-bound' test diluted the force of strict scrutiny . . . is a poor substitute for . . . the Supreme Court's five-factor narrowly tailored analysis . . . [and] broke with Supreme Court precedent").

In fact, just a year earlier, in *Local 28 of Sheet Metal Workers v. EEOC*, 478 U. S. 421 (1986), the Court, in affirming a contempt citation, held that the remedial order ignored by the union was narrowly tailored because it was a temporary tool that had a scheduled termination date. 478 U. S. at 479 (plurality opinion of Brennan, J.); *id.*, at 487 (Powell, J., concurring). Moreover, with respect to participation in the apprenticeship program, a key component in the attainment of the 29% minority membership goal, the one-for-one ratio was temporary because it remained in effect only until the development of a validated entrance exam:

> The Court of Appeals for the Second Circuit affirmed the District Court's determination of liability, finding that petitioners had "consistently and egregiously violated Title VII." * * * The court upheld the 29% nonwhite membership goal as a temporary remedy, justified by a "long and persistent pattern of discrimination," id., at 830. . . * * * *However, the court modified the District Court's order to permit the use of a white-nonwhite ratio for the apprenticeship program only pending implementation of valid, job-related entrance tests.* 478 U. S. at 433. (Italics added.)[7]

In 1989, when the Court next addressed narrow tailoring in an affirmative action context, in *City of Richmond v. J. A. Croson*, 489 U. S. 469, Justice O'Connor, in her plurality opinion as to Part V, provided some insight to her dissent in *Paradise*, 480 U. S. at 196-201, and partial dissent in *Sheet Metal Workers*, 478 U. S. 489-99, when she observed that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of

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[7] *See*, Department of Justice's Memorandum to General Counsels: *Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc. v. Pena*, (June 28, 1995) at fn. 53 <http://www.usdoj.gov/olc/adarand.htm> (citing *Paradise* and *Sheet Metal Workers* as examples of built-in sunset provisions, i.e., the quotas evaporated upon the development of validated exams).

deliberate exclusion." 488 U. S. at 509.[8] Considering that in both *Paradise* and *Sheet Metal Workers* there were mandates to administer validated employment selection procedures, that in itself, without the imposition of race-conscious preferences, provided assurance that patterns of deliberate exclusion would be broken down. *Cf., Middleton v. City of Flint*, 92 F.3d 396, 411 (6th Cir. 1996) ("the message of both *Croson* and *Paradise* is that the complete implementation of such reform is not a prerequisite to avoiding a quota remedy); *Dallas Fire Fighters Ass'n. v. City of Dallas*, 150 F.3d 438, 441 (5th Cir. 1998) (affirmative action plan requiring "out-of-rank promotions" over an anticipated 10 year period was not narrowly tailored, even though race neutral devices, such as validated promotional exams, "do not operate as quickly").

While the "ephemeral" duration of the race-based remedy—with the promotional preferences to endure only until a validated examination process was in place—constituted the "[m]ost significant[]" narrow-tailoring tool utilized in *Paradise*,[9] the court of appeals makes not even a passing reference to *Paradise*. Of course, attempting to reconcile respondent's long-lasting affirmative action program with *Paradise's* emphasis on ephemerality would be daunting even to the most accomplished of jurists:

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[8] Justice O'Connor presumed that *Sheet Metal Workers* and *Paradise* were extreme cases of past discrimination: describing the former as "egregious," 478 U. S. at 498, and the latter as "pervasive, systematic, and obstinate." 480 U. S. at 196. Nevertheless, in her dissent in *Paradise*, Justice O'Connor considered the "use of racial preferences," even during an interim period, i.e., until there was a promotion procedure that complied with the consent decree, as too long for the "rights of non-minority troopers" to be "trammell[ed]." *Id.*, at 200.

[9] Limited duration is "a key factor in assessing [the] validity" of affirmative action. *See, Danskine v. Miami Dade Fire*, 253 F.3d 1288, 1301 (11th Cir. 2001), *citing, Engineering Contractors Ass'n of South Fla., Inc. v. Metropolitan Dade County*, 122 F.3d 895, 927 (11th Cir. 1997).

> For more than 20 years respondent has been bound by a promotion consent decree. The consent decree requires every promotion exam to satisfy one of the validation techniques prescribed by the Federal Uniform Guidelines. Not a single judicial challenge has been made to the validity of the six promotion exams that are the subject of this Petition. Respondent's initiation of affirmative action promotions in 1987 was concurrent with the onset of promotional exams validated pursuant to the consent decree. Respondent has administered a second generation of validated promotion exams in the ranks of engineer, lieutenant, and captain. Notwithstanding respondent's representations that affirmative action would apply "only for the anticipated three year life of the [previous] eligibility list," DX 1-3, 4-1, 5-2, 6-2, affirmative action promotions have continued. *See*, Statement of the Case, ¶¶ 1-4, at 6-7.

The decision below effectively subordinates validated exams in favor of racial preferences, and that puts the decision in conflict with *Paradise*: a failure to abate racial preferences once the goal of race neutral selection processes are attained, means that those preferences have become an end to themselves, and that is the antithesis of the principle that race conscious relief must be ephemeral. *See, Aiken v. City of Memphis*, 37 F.3d 1155, 1164 (6th Cir. 1994) (City made "no effort to limit the duration" of "raced-based promotional remedies" with "the use of validated non-discriminatory promotional procedures"); *Sims v. Montgomery County Comm'n.*, 873 F.Supp. 585, 605 (M.D. Ala. 1994) (finding reasonable duration when the "promotion of the three blacks was a one-time interim measure used only until validated testing procedures could be put in place"); *Cf. In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525, 1546-47 (11th Cir. 1994) (administration of race neutral promotion exam was an alternative to promotional quotas that would be in effect for a minimum of 6 years).

Nor does the decision below square with *Croson*: by the time of trial in 1997, the patterns of deliberate exclusion in the CFD had been broken by virtue of 18 years of consent decree hiring, as well as 10 years of promotions based on validated exams governed by a 1980 consent decree to which respondent still remains beholden.

B. In Conflict With Decisions Of This Court And Of Other Circuits, The Decision Below Abandoned Strict Scrutiny By Its Approval Of An Affirmative Action Plan That Has Neither A Fixed Termination Date Nor Any Logical Or Discernible Stopping Point.

Not only is the court of appeals' decision in conspicuous disaccord with *Paradise's* bright line test, which confines the duration of promotional preferences until such time as a validated employment exam is administered, but it also falls short of other yardsticks that lower courts have used in the years since the decision in *Paradise* issued—and *Paradise* was the last time the Court has, to any extent, considered the durational aspect of narrow tailoring. In scrutinizing affirmative action plans to determine whether they are "ephemeral," other circuits make an inquiry whether the affirmative action program incorporates a provision which calls for "the *planned* duration of the remedy." *Fullilove v. Klutznick*, 448 U.S. 448, 510 (1980) (Powell, J., concurring) (Italics added); *see also, Boston Police Superior Officers Fed. v. City of Boston*, 147 F.3d 13, 23-25 (1st Cir. 1998) (limited duration requirement has generally been met by "built-in mechanisms" to limit the duration of remedial programs), *quoting Mackin v. City of Boston*, 969 F.2d 1273, 1278 (1st Cir. 1992); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 428 (D.C. Cir. 1992) (in the absence of a "sunset provision" ordinance not narrowly tailored).

In *Edwards v. City of Houston*, 37 F.3d 1097, 1113-14 (5th Cir. 1994), the built-in mechanism consisted of specifications

about both the number of preferential promotions and the plan's five year duration. In *Howard v. McLucas*, 871 F.2d 1000, 1009 (11th Cir. 1989), the plan was narrowly tailored since "the relief . . . evaporates when the 240 promotions are made." However, "[w]hen employers use race-conscious programs for undefined interim periods . . . more often, courts will invalidate the remedy altogether, modify the program's duration, or remand the case for reevaluation on the duration issue." Day, *Retelling the Story of Affirmative Action*, *supra, fn.* 7, 89 Cal. L. Rev. at 114-15 (footnotes and citations omitted); *see also, Davis v. City and County of San Francisco*, 890 F.2d 1438, 1447-48 (9th Cir. 1989) (court itself rectifies absence of a sunset provision for a race-conscious hiring program, by limiting it to seven years). *Cf. Tuttle v. Arlington County School Bd.* 195 F.3d 698, 706 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000) (*Croson's* "logical stopping point" missing from school assignment policy that was to continue for the 1999-2000 school year "and thereafter").

The appearance in each of respondent's affirmative action announcements of boiler-plate language that sets the termination date for affirmative action upon the expiration of the "anticipated three year life" of an eligibility list, does not qualify the plan as narrowly tailored—certainly not under the strictures of strict scrutiny. *Adarand*, 515 U. S. at 236 ("[R]equiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications a detailed examination, as to both ends and means.").[10] During summary judgment proceedings 11 years ago the district

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[10] *Paradise* was decided *before* a majority of the Court for the first time agreed that raced-based actions of state and local governments must survive strict scrutiny. *Croson* ,488 U. S. at 493 (O'Connor, J.,); *id.*, at 520 (Scalia, J., concurring). The parties' merit briefs to the Court in *Adarand Constructors, Inc. v. Mineta, cert. granted*, 532 U. S.___ (2001), No. 00-730, does address the issue of whether a federal set-aside program satisfies the durational limits under strict scrutiny.

court accepted at face value respondent's representations that its nascent race-based promotional goals were narrowly tailored because they would be "eliminated . . . after three years." *Chicago Fire Fighters Union Local No. 2 v. Washington*, 736 F.Supp. at 932. Respondent's affirmative action goals were not, however, eliminated at the time of trial 11 years later (1997), let alone three years (1990) after the those "goals" were implemented . Statement of the Case, ¶¶ 2-4, at 6-7; *see also*, fn. 6, *supra, Recent Cases*, 112 Harv. L. Rev. at 564-65.

Respondent's lack of candor about the duration of its affirmative action program was not the least bit disconcerting to either the trial court or the court of appeals, since they both ignored any reference to respondent's continuous over-reaching. *Contrast, Stuart v. Roache*, 951 F.2d 446, 454 (1st Cir. 1991) (while a promotional consent decree in effect for 11 years is a long time, duration not unreasonable given court's confidence that the preferences would end in one year). Strict scrutiny, however, does not tolerate the sort of sandbagging in which respondent has engaged. Rather, under strict scrutiny, a court is to bring a healthy dose of "skepticism" to the inquiry, *Adarand*, 515 U. S. at 223-24, which means that it is "inappropriate for a court engaged in constitutional scrutiny to accord deference" to pronouncements made by the party advocating a racial classification. *Miller v. Johnson*, 515 U. S. 900, 923 (1995).[11] Because the

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[11] Because of the existence of intentional past discrimination in the CFD, it was unnecessary to address respondent's additional justification for affirmative action, Pet. App. 128a fn. 4, *viz.*, to advance diversity. DX 5-2. The diversity rationale alone should have instilled skepticism regarding any assertion that respondent's program is of limited duration: "[T]he diversity rationale makes it unnecessary to answer the hardest question about a program of affirmative action: the question of when it is time to stop." Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 Univ. of Colorado L.Rev. 939, 953 (1997).

court of appeals abdicated the demands of strict scrutiny, by its unquestioned acceptance of limited durational pronouncements that respondent has repeatedly honored in the breach, the Court should grant the writ:

> The Court of Appeals did not decide the question whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling." It also did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was "any consideration of the use of race-neutral means to increase minority business participation" in government contracting, *Croson*, *supra*, at 507, or whether the program was appropriately limited such that it "will not last longer than the discriminatory effects it is designed to eliminate," *Fullilove*, *supra*, at 513 (Powell, J., concurring). *Adarand*, 515 U. S. at 237-38.

II. THE DECISION BELOW DEBILITATES THE FORCE OF THE NARROWLY TAILORED PRONG OF STRICT SCRUTINY BY MAKING AFFIRMATIVE ACTION BEHOLDEN TO SPECULATIVE AND OUTSIZED HIRING GOALS THAT ARE TIMELESS IN THEIR ABILITY TO AFFECT THE FUTURE.

The one durational benchmark that the court of appeals' decision considered, dealt with the quantification question, which asks what the racial composition of the CFD's promotional ranks might have looked like, during the years 1987-1997, had respondent not engaged in past intentional discrimination. Pet. App. 2a-3a, 7a-8a. The court dismissed petitioners' arguments about the "interminability" of respondent's affirmative action policy, holding that cessation of that policy would be reached "at the point at which the consequences of the past discrimination have substantially

dissipated." Pet. App. 6a.[12] However, given the court of appeals' acceptance of a census based proportional hire model, Statement of the Case, *supra*, at p. 5, and ¶ 6, at 8, the stopping point is based on a hypothetical formula that has never been attained. Even when strict scrutiny is not the governing standard, "[w]hen an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable," the opinion cannot support a judgment. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993). The proportional hiring predictions of respondent's expert were so wide of the mark, Statement of the Case at 4, ¶¶ 5-6, at 7-8, that the district court made a 28% downward adjustment of the minority percentage in each promotional rank, as the ratio respondent's affirmative action plan could aim for. Pet. App. 138a, 169a, 176a, 192a; *see also* fn 2 and surrounding text.

The "relationship of . . . numerical goals to the relevant labor market" is a narrow tailoring inquiry, *Paradise*, 480 U.S. at 171, and nothing "'but the most exact connection between justification and classification," is permissible.

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[12] Justice O'Connor's plurality opinion in *Adarand*, 515 U. S. at 237-38, which the court of appeals cites for the quoted proposition, actually directs courts, as part of strict scrutiny, to see to it that a "'program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" *Fullilove*, 448 U. S. at 513 (Powell, J., concurring). Since Justice O'Connor, in *Paradise*, would not subscribe to the promotional preferences in that case, and considering that this quotation from *Fullilove* is found in Part IV of *Adarand*, in which the Chief Justice, along with Justices Scalia, Kennedy and Thomas joined, the Court was not quoting *Fullilove* for purposes of endorsing racial preferences. As Justice Scalia opines in his concurrence, "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction." 515 U. S. at 239. The court of appeals was clearly mistaken to rely on *Adarand* to uphold respondent's use of racial preferences for more than a decade, and counting.

Adarand, 515 U.S. at 229, *quoting*, *Fullilove*, 448 U. S. at 533-535, 537 (Stevens, J., dissenting). The court of appeals' resurrection of the proportional hiring model advocated by respondent's expert—numbers that have never been realized even under the relatively ideal conditions that governed when the hiring consent decrees were in effect—is based on a "'completely unrealistic' assumption", and is, therefore, not the product of the "searching judicial inquiry" demanded by strict scrutiny. *Croson*, 488 U.S. at 493, 507; *Shaw v. Hunt*, 517 U. S. 899, 908 n. 4 (1996) ("a racial classification cannot withstand strict scrutiny based upon speculation"); *Wygant v. Jackson Bd. of Ed.*, 476 U. S. 267, 294 (1986) (a "hiring goal that . . . has no relationship" to the employment discrimination it is intended to remedy does not "pass the onerous 'narrowly tailored' requirement") (O'Connor, J. concurring).

What is not a matter of speculation is that since the administration of the1995 entrance exam, the hiring rates of minorities have dropped precipitously. Statement of the Case ¶¶ 7-8, at 9. The court of appeals rejected outright the 1995 entrance exam outcomes as an appropriate indicator of what the minority composition of the CFD might have been in the absence of past discrimination, Pet. App. 5a-6a, due to the pendency of a Title VII disparate impact suit (not a disparate treatment or intentional discrimination case). What the 1995 exam demonstrates is that under non-intentionally discriminatory conditions there can still be vast differences in the comparative hire rates of whites and minorities. Indeed, in a case decided two months after the decision that is the subject of this petition, Judge Posner made these observations about the type of numerical goals that narrow tailoring will countenance:

> If a state or local government had in consequence of its former discrimination limited the percentage of minority contractors on public projects to 10 percent, *and in the absence of discrimination the percentage would have*

> *been 20 percent*, the government could not, by way of remedy, establish a minority quota of 50 percent. *Builders Assn. of Greater Chicago v. Cook County*, 256 F.3d 642, 247 (7th Cir. 2001). Italics added.

The proportional hiring model developed by respondent's expert also fails under another principle of strict scrutiny. The proportional hire model is not the criterion that respondent used to determine whether to engage in affirmative action; instead, since at least 1990, respondent has measured minority shortfalls in promotional ranks based on inter-rank comparisons, not to census comparisons upon which the promotional hire model is based. Statement of the Case ¶ 6 fn. 3. Respondent's present reliance on the census based proportional hire model amounts to a justification that is "hypothesized or invented *post hoc* in response to litigation," which is impermissible under strict scrutiny. *U. S. v. Virginia*, 518 U. S. 515, 533 (1996).

The proportional hiring model accepted by the court of appeals will transform respondent's 14 year old affirmative action plan into an interminable program because it is based on unrealized and unrealistic assumptions that are "timeless in [their] ability to affect the future." *Croson*, 488 U.S. at 498, quoting *Wygant*, 476 U.S. at 276..

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 00-1272, 00-1312 to
00-1314 & 00-1330

CHICAGO FIREFIGHTERS LOCAL 2, *et al.*,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 87 C 7295, 89 C 7984, 93 C 5438, 93 C 6175
& 96 C 808—James F. Holderman, Judge.

Argued February 14, 2001
Decided May 3, 2001
As Amended May 25, 2001

Before Posner, Coffey, and Ripple, Circuit Judges.

Posner, Circuit Judge.

These consolidated cases, one dating back to 1987, are brought on behalf of white firefighters who complain that their right to the equal protection of the laws has been infringed by affirmative-action promotions of black and Hispanic firefighters made by the Chicago Fire Department. (One of the plaintiffs also has a Title VII claim of "race norming.") The district court rendered judgment for the City after a bench trial. We affirmed a similar judgment in

McNamara v. City of Chicago, 138 F.3d 1219 (7th Cir. 1998), a challenge by other white Chicago firefighters to the department's affirmative-action promotions, and the salient facts determined in that proceeding, *see id.* at 1222-24, are similar to those found by the district judge in the present one.

The plaintiffs concede that the fire department long engaged in deliberate discrimination against blacks and Hispanics—that, as we said in *McNamara*, "until sometime during the 1980s the people running the fire department endeavored with considerable success to make the department uncongenial to blacks and Hispanics." *Id.* at 1224. The first exam for promotion that was validated as being nondiscriminatory was given in 1987, at which time only 2.6 percent of the department's captains were black and only 1 percent Hispanic. Had promotions to captain been made on the basis of performance on the 1987 exam, 14 percent would have been of black candidates and 3.5 percent of Hispanic ones. The affirmative action plan challenged in *McNamara* and in the present case boosted these percentages to 20 and 5, respectively, but because there were so few minority captains to begin with, and because promotions are infrequent, the actual percentage of minority captains remains far below the minority percentage of the city's population even after correction for age, sex, and other demographic variables that tend to vary by race and ethnicity. According to the 2000 Census, 37 percent of the city's population is black and 26 percent Hispanic, though there is some overlap because some Hispanics are classified as black; most however are classified as white.

After the promotions to captain were complete in 1992, the percentage of black captains was still only 10.8 percent and of Hispanic captains only 3.6 percent—both significantly below the target minority percentages for these ranks. Similar shortfalls characterize the other ranks as well (firefighters, engineers, lieutenants, and battalion chiefs); in addition, as

shown in the following table, the minority perentages in all the upper ranks are lower than the minority percentages in the lowest rank. Notice how even in the lowest rank the minority percentages are far below the corresponding minority percentages of the city's population as a whole. As late as 1997, only 27 percent of firefighters promoted to engineer were black and 10 percent Hispanic.

Minority Percentages, Chicago Firefighters, 1996

Rank	% Black	% Hispanic
Firefighter	24.3	9.2
Engineer	17.8	5.1
Lieutenant	15.4	5.8
Captain	16.3	4.9
Battalion Chief	8.2	3.1

The plaintiffs argue, however, that population is the wrong pool to use to calculate departures from proportionality. Suppose, by way of illustration of their argument, that the fire department actually and lawfully required that captains be able to pass a Ph.D. exam in chemistry. Then the fact that the percentage of minority captains was smaller than the percentage of age- adjusted and sex-adjusted Chicagoans who are black or Hispanic would be of no legal significance. The proper comparison group would be blacks and Hispanics who were able to pass a Ph.D. exam in chemistry. *See, e.g., Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 651-52 (1989); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501-02 (1989); *Hazelwood School Dist. v. United States,* 433 U.S. 299, 308, 310-11 (1977); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1553-54 (11th Cir. 1994). The plaintiffs argue that before 1972, the exam that the City required of applicants for firefighter positions required at least as much knowledge as a high-school graduate could be expected to have, that 95 percent of the minority applicants flunked the exam, and so the comparison group should be limited to 5 percent of the minority population of Chicago. In

1970 that would be less than 2 percent of the City's population (this is a guess, but a pretty good one, since 44.4 percent of the City's population between the ages of 20 and 39 was black or Hispanic then), implying that blacks and Hispanics were actually over represented in the department, which in 1974 (we do not have a figure for 1970) was 4.5 percent black and Hispanic.

If this is right, then even though explicit discrimination against blacks and Hispanics by the fire department in that era is conceded, it would not justify affirmative action designed to bring the percentages of blacks and Hispanics in the department more into line with their percentages of the relevant labor pool. Although those pre-1972 exams had a disparate impact on minorities (it can be inferred from the documents in the record that the white pass rate exceeded 20 percent, compared, as we have said, to a 5 percent pass rate for the members of the minority groups), and were never shown to be job-related, only deliberate discrimination is actionable under the equal protection clause. *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229, 239-48 (1976). And that is the only basis on which a pre-1972 exam could have been challenged, since Title VII (which makes disparate-impact discrimination actionable) was not amended to bring state and local governments within its grasp until 1972. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-48 (1976).

In effect, the plaintiffs are arguing a lack of causal connection between the City's deliberate discrimination, which they concede, against blacks and Hispanics from time immemorial to as late as the mid-1980s and the disproportionately small number of blacks and Hispanics employed by the fire department today. The plaintiffs regard the appearance of disproportionality as an artifact of the district judge's having failed to use the right comparison group—his ignoring what they contend is the high educa-

tional threshold that all applicants for jobs with the fire department had to cross. It is a curious argument, with no direct support in the case law: an employer discriminates deliberately in violation of the Constitution, but because it also discriminates without intending to do so and therefore not in violation of the Constitution or (at the time of the discrimination) of Title VII, it can provide no relief for the victims of the discrimination without infringing the constitutional rights of employees who were not discriminated against.

We need not consider the legal standing of the argument, however, because it lacks adequate factual support. The evidence consists of a newspaper article, which is inadmissible hearsay on the point, *Eisenstadt v. Centel Corp.*, F.3d 738, 742 (7th Cir. 1997), and recollections by three officials concerning the difficulty of an exam they last saw more than twenty years ago—the exam itself was not produced—offered for the implausible propositions that those pre-1972 exams required as much knowledge as a high-school graduate would be expected to have, and, even more important, that the exams were not themselves a part of the scheme of deliberate discrimination. An exam that has a disparate impact and is not job related may be innocent, but then again it may be a deliberate device to exclude minority applicants. That it was the latter is the more plausible inference given the stubbornness with which the department, until the mid-1980s, resisted equal treatment of blacks and Hispanics.

The plaintiffs point us to an exam that the City gave in 1995 to new applicants for firefighter positions. The white pass rate was higher (97 percent) than the pass rates of the blacks and Hispanics (54 percent and 66 percent respectively) and from this the plaintiffs ask us to infer that it is the educational deficiencies of the members of the minority groups, rather than discrimination, that is responsible for their having been underrepresented in the department in the period,

before the mid-1980s, in which their under representation furnished the justification for affirmative action. But the 1995 examination has never been determined to be an accurate, unbiased test of job-related skills. It has been challenged in litigation, not yet resolved, as being discriminatory, and there is no evidence in the record of this case to validate it as a proper screen for jobs in the fire department. The district judge was therefore not required to accept it as evidence of an incapacity of members of the minority groups to meet appropriate educational standards for firefighters.

In their emphasis on the 1995 exam and the pre-1972 exams, the plaintiffs overlook a more direct problem with the pool used by the district judge (the age- and sex-adjusted Chicago population)—namely that the fire department draws applicants from the Chicago suburbs (for since 1974 applicants have been required merely to reside in the city on the date they submit their application and so they could move to the city on the same day they applied), and the suburbs are "whiter"—and also a more substantial problem with the City's affirmative-action program. The plaintiffs allude to the latter problem by accusing the program of "interminability," but give no more than a bare hint of what they mean by this. What they could mean, but do not say, is that affirmative action designed to remedy past discrimination must, because it is itself a form of racial discrimination and must therefore withstand the beady-eyed review that goes by the name of "strict scrutiny," *e.g.*, *City of Richmond v. Croson, supra; Billish v. City of Chicago*, 989 F.2d 890, 891 (7th Cir. 1993) (en banc), cease at the point at which the consequences of the past discrimination have substantially dissipated. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237-38 (1995); (plurality opinion); *Middleton v. City of Flint*, 92 F.3d 396, 411-12 (6th Cir. 1996); *Taxman v. Board of Education*, 91 F.3d 1547, 1564 (3d Cir. 1996) (en banc) (alternative holding); cf. *People Who Care v. Rockford Board of Education*, No. 00-3200, 2001 WL 388935 (7th Cir. Apr. 18,

2001), and cases cited there. In 1987, the City administered an entrance-level test that is conceded to have been appropriate. Anyone who took the test, passed it, and was hired was eligible in 1993 to take the exam for lieutenant, and in 1994 to take the exam for engineer. Suppose that owing to rapid turnover, the pool of firefighters eligible to take the 1993 and 1994 exams was composed entirely of people hired on the basis of the 1987 exam. Suppose further that promotions based on the 1993 and 1994 exams were free from discrimination. Then, unless minority persons had been deterred by earlier discrimination from taking the 1987 exam, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977), there would be no basis for giving them a leg up in promotions. But if, say, only 50 percent of the pool of eligibles in 1993 and 1994 had been hired from among people who passed the 1987 exam, and the rest had been hired earlier, at a time when the fire department discriminated against minority applicants, then the pool of eligible minority applicants for promotion in 1993 and 1994 would have been artificially limited and some favoritism in promotion would have been necessary to create as many black engineers and lieutenants as could have been expected to be promoted to these ranks had the department never discriminated. The plaintiffs have failed, however, in their briefs in this court to argue that our first hypothetical gives a true picture of the facts.

The argument is therefore forfeited, along with another possible argument—that unless there is very heavy turnover in the department, a policy of hiring members of minority groups in excess of its percentage of the labor pool will eventually result in overshooting the hiring goal. Suppose blacks are 25 percent of the labor pool, but only 10 percent of the fire department, so one year the department hires 40 percent blacks, and it repeats this until 25 percent of the department is black. As the years go by, those 40 percent black vintages, constituting a larger and larger fraction of the

total workforce, will bring the black percentage above 25 percent even after the department has (because new hires of minority persons are now equal to the percentage of such persons in the labor pool) abandoned its affirmative-action hiring—unless the department discriminates against minorities in new hiring, which would be illegal. The easiest way to grasp this point is to imagine that at time 1, the department has 1,000 employees, of whom 900 are white and 100 are black; that at time 2, some years later, 500 of those employees have retired (450 whites and 50 blacks) and 500 new employees have been hired, of whom 200 are black, so that 25 percent of the workforce is now black; and that at time 3, the other 50 percent of the workforce in time 1 have retired (450 whites and 50 blacks) and been replaced by 125 newly hired blacks (25 percent of 500) and 375 newly hired whites. Then at time 3 the workforce will consist of 325 blacks and 675 whites—and thus will be almost one-third black, rather than one-quarter.

The only plaintiff to preserve a Title VII claim, Richard Temple, argues that the City has engaged in the practice forbidden by that statute of "race norming," which means altering scores on tests so that the mean score is the same for each race. 42 USC sec. 2000e-2(l); *Billish v. City of Chicago, supra*, 989 F.2d at 895; *Hayden v. County of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999); *Baynes v. AT & T Technologies, Inc.*, 976 F.2d 1370, 1374 n. 5 (11th Cir. 1992) (*per curiam*). If the average black score on a test was 100 and the average white score 110, rescoring the average black test as 110 would be forbidden race norming; likewise if, regardless of relative means, each black's score was increased by 10 points on account of his race, perhaps because it was believed that a black with a 10-point lower score than a white could perform the job just as well (in other words that blacks are better workers than test takers). What the City actually did as to "band" scores on the various promotion exams that the plaintiffs challenge and treat scores falling within each band

as identical. So, for example, if 92 and 93 were both in the A band, a black who scored 92 would be deemed to have the same score as a white who scored 93.

We must consider whether banding, when it works to the advantage of a particular racial or ethnic group, is race norming. This is a question of first impression. For although banding has been upheld as a valid method of affirmative action, *Boston Police Superior Officers Federation v. City of Boston*, 147 F.3d 13, 24 (1st Cir. 1998); *Officers for Justice v. Civil Service Commission*, 979 F.2d 721 (9th Cir. 1992); *Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140, 1148 (2d Cir. 1991), none of the cases considers its consistency with the prohibition of race norming. *See, e.g., Officers for Justice v. Civil Service Commission, supra*, 979 F.2d at 725-26.

We have no doubt that if banding were adopted in order to make lower black scores seem higher, it would indeed be a form of race norming, and therefore forbidden. But it is not race norming per se. In fact it's a universal and normally an unquestioned method of simplifying scoring by eliminating meaningless gradations. Any school that switches from number grades to letter grades is engaged in banding. But even number grading systems are banded. Take a grading system in which 100 is the maximum grade and anything below 60 is failing. Suppose further that there are 200 questions, each to be weighted equally in the grading. Someone who answered all 200 correctly would get a score of 100. But what of someone who answered 199 correctly? Would he get a score of 99 or 100? He "should" get a score of 99.5, but normally exams are not scored so finely. So if he is given a score of 100, he has been put in a band, the 99 to 100 band, and if he is given a score of 99, he is put in another band, with anyone who answers 198 questions correctly. The narrower the range of abilities in a group being tested, the more attractive banding is. If the skill difference between someone who gets 200 questions right and someone else who

gets 199 right is trivial to the point of being meaningless, then giving them different grades is misleading rather than illuminating. It is on this basis that a school will sometimes substitute letter grades for number grades, thus, for example, placing all grades of 90 to 100 in the band called A, all grades between 80 and 89 in B, and so forth. Banding in this sense does not discriminate invidiously between a student who would have gotten 85 in a number grading system and a student who would have gotten 84 in such a system, just because now both get B. Nor is banding likely to favor one group over another. Switching from number to letter grades helps the student who would have gotten a 90 and now gets the same grade as a student who would have gotten 100, but it hurts the student who would have gotten an 89 and now is lumped in with students at the bottom of the B band.

The plaintiffs argue that even if affirmative action in fire department promotions is justified by the history and lingering effects of the department's long-standing discrimination against minority persons, the requirement of "narrow tailoring" required the City to lessen the burden on the white employees in one of three ways: creating vacancies for blacks by adopting an early retirement plan that would lure whites into retiring early, making way for the blacks and Hispanics; paying whites passed over for promotions in favor of minority persons what the whites would have been paid had they been promoted instead; or promoting whites on the same schedule they would have been promoted on had it not been for affirmative action, and thus simply promoting more people rather than promoting some minority firefighters in place of some white ones ("wrap-around promotions"). These methods of softening the blow sound very different but are really the same: the cost of affirmative action is shifted from the whites actually disadvantaged by it, that is, the whites who are competing for promotions with the beneficiaries of affirmative action, to the taxpayers, who would be funding

the early retirement plan, the "as if promoted" pay raise, and the redundant promotions (the wrap arounds).

This argument misunderstands "narrow tailoring." Because affirmative action, at least when it takes the form of giving persons a leg up in hiring or promotion on the basis of their race (or, in the case of Hispanics, ethnicity, which for these purposes is equated to race), is a form of racial discrimination, the courts insist not only that there be a compelling case for it but also that it discriminate as little as is consistent with the achievement of its valid objective. *See Majeske v. City of Chicago*, 218 F.3d 816, 819-24 (7th Cir. 2000); *McNamara v. City of Chicago, supra*, 138 F.3d at 1222, and cases cited in both these opinions. In the present setting this means that as few white firefighters should have their promotions delayed to make way for blacks and Hispanics as is consistent with remedying the lingering effects of the fire department's long history of racial discrimination. With the plaintiffs' other arguments rejected, it is apparent that this requirement has been met. What the plaintiffs seek by their "narrow tailoring" argument is not narrowing the scope of the affirmative action plan but shifting its incidence from the white firefighters to the City's taxpayers, a group that, ironically, includes a large number of blacks and Hispanics, while on the other hand some at least of the disadvantaged white firefighters may have benefited from the lack of competition from nonwhites in the era of racial discrimination. But that irony is not our point. Our point is that the financial incidence of an affirmative action plan is normally a detail from the constitutional standpoint. This would be obvious if white firefighters had "affirmative action insurance," insuring them against the cost of delayed promotions due to affirmative action programs. The existence of such insurance would not transform the case from one of discrimination against white firefighters to discrimination against the members of the insurance pool. For compelling reasons of practicality, courts generally ignore the incidence

of challenged conduct; hence the rejection of a "passing on" defense in antitrust, *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731-33 (1977), and hence the economic-loss doctrine of tort law. *E.g., All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 865 (7th Cir. 1999). Likewise it would not be practical for the district judge or us to decide whether the City's taxpayers are the more appropriate group to bear the burden of the affirmative action program than the white firefighters.

What is true is that any individual hurt by an affirmative action plan can complain that the burden on him is undue, for example if he's being told to give up his job. *See, e.g., Wygant v. Jackson Board of Education*, 476 U.S. 267, 282-84 (1986) (plurality); *McNamara v. City of Chicago, supra*, 138 F.3d at 1222; *Taxman v. Board of Education, supra*, 91 F.3d at 1564; *Peightal v. Metropolitan Dade County, supra*, 26 F.3d at 1561. But this principle is not in play when the only complaint is about a modest delay in promotion. *Boston Police Superior Officers Federation v. City of Boston, supra*, 147 F.3d at 24; *Peightal v. Metropolitan Dade County, supra*, 26 F.3d at 1561-62. All but one of the plaintiffs has been promoted to the job he sought, just on a slightly retarded timetable. The burden of delay that they have thus sustained is insufficient to warrant the courts in deciding whether to shift that burden to the taxpaying public, an inquiry that would involve judges in indefinite and intractable issues of public finance. For all we know, the burden has already been shifted, by changes in the compensation of Chicago firefighters designed to protect them against the consequences of the affirmative action plan.

One of the plaintiffs, it is true, John Fitzgerald, has not yet been promoted—has in fact been waiting three years to be promoted and because his score on the 1989 test is now so old will have to take another captain's test before he can be promoted, promising further delay. But we do not understand

him to be seeking relief separate from his fellow plaintiffs, such as an immediate promotion, but instead to have joined with them in seeking to have the affirmative action plan invalidated. He has not preserved an individual claim.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 87 C 7295

CHICAGO FIREFIGHTERS UNION
LOCAL NO. 2, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO,
Defendant.

No. 89 C 7984

CHICAGO FIREFIGHTERS UNION
LOCAL NO. 2, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO,
Defendant.

No. 93 C 5438

MARTIN O. HOLLAND, *et al.*,
Plaintiffs,

v.

CITY OF CHICAGO,
Defendant.

No. 93 C 6175

BRIAN T. MCMAHON, *et al.*,

Plaintiffs,

v.

CITY OF CHICAGO,

Defendant.

No. 96 C 808

ROBERT MOLINARI, *et al.*

Plaintiffs,

v.

CITY OF CHICAGO,

Defendant.

MEMORANDUM OPINION FINDINGS OF FACT AND CONCLUSIONS OF LAW

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INTRODUCTORY SUMMARY

The Chicago Fire Fighters Union, Local No. 2 ("Local 2") and ninety-three individual plaintiffs in these five consolidated cases against the City of Chicago ("City") [1] challenge certain employment promotions made by the Chicago Fire Department ("CFD") between 1987 and 1997. The promotions plaintiffs challenge were made using lists complied after each of the following six promotional examinations: 1985 engineer exam #40001, 1987 captain exam #68737, 1989 battalion chief exam #88001, 1991 captain exam #39104, 1993 lieutenant exam #39202, and 1994 engineer exam #39305. The respective candidates for promotion who attained a passing score were ranked on the promotional lists in the order of their scores. Promotions were then made starting with the person who had the highest score at the top of each list and moving down. As promotions were made over time, the CFD on certain occasions selected the next ranked African-American or Hispanic candidate or candidates for promotion rather than the next ranked candidate or candidates without consideration of race or ethnicity. These non-rank order promotions of the minority candidates form the crux of the dispute in these cases. The individual plaintiffs, who are primarily white, were considered non-minority candidates for promotion. Those plaintiffs who have proper standing in these cases claim that their own promotions were delayed or denied as a result of the non-rank order promotions of the minority candidates within the CFD.

The plaintiffs contend, in essence, that their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution were violated by the CFD's

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[1] With the agreement of all counsel, the court on June 28, 1999, dismissed all defendants other than the City of Chicago. The captions of the cases have been changed accordingly.

non-rank order promotions of the minority candidates. The City conceded from the outset that plaintiffs established prima facie case of discrimination. The City sought to defend the CFD's non-rank order promotions as being narrowly tailored City policy of affirmative action designed to remedy the effects of intentional past discrimination. The five cases were consolidated for pretrial proceedings and for trial[2] in accordance with the directions of the United States Court of Appeals for the Seventh Circuit in *Billish v. City of Chicago*, 989 F.2d 890, 897, *cert. denied*, 114 S.Ct. 290 (1993). A bench trial in these five consolidated cases commenced with opening statements on July 14, 1997, and proceeded intermittently thereafter.[3] The trial concluded with closing arguments on June 28, 1999. The court finds the City has met its burden on the merits in all cases. Plaintiffs have not. Judgment will be entered in favor of defendant City as to each plaintiff in each case.

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[2] Another case, *McNamara v. City of Chicago*, 93 C 1098 (N.D. Ill.), which had been consolidated before this court for pretrial purposes, went to trial before Judge Suzanne Conlon regarding certain non-rank order promotions made from the list compiled after the 1987 captain exam. Following that trial, Judge Conlon issued a written decision, *McNamara v. City of Chicago*, 959 F. Supp. 870 (N.D. Ill. 1997), which was affirmed in *McNamara v. City of Chicago*, 138 F.3d 1219 (7th Cir. 1998). The parties by agreement submitted transcripts in the *McNamara* trial as evidence in the trial of these five consolidate cases. Those transcripts are referred to as "McNamara Tr. at ___." The case *Billish v. City of Chicago*, 87 C 8731 (N.D. Ill.), which has the same plaintiffs' counsel as the *McNamara* case and deals with promotions made after the 1978 captain exam, has not yet gone to trial. It remains pending awaiting the decision here.

[3] The trial transcripts in these consolidated cases are cited as "CFFU Tr. at ___." "PX" refers to plaintiffs' exhibits. "DX" refers to defendant's exhibits. "JX" refers to joint exhibits. The court has not attempted to cite the record in support of every fact. The citations provided are examples of supporting evidence and do not constitute the only evidence on which the court relied.

THE PARTIES AND THEIR CONTENTIONS

The plaintiffs in all five consolidated cases claim, under 42 U.S.C. § 1983, that the City had affirmative action policies that favored minority fire personnel over white fire personnel in various promotions within the CFD. Plaintiffs claim that the challenged affirmative action plans of the City violated plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment. The City has conceded that the plaintiffs' who have standing, have established a prima facie case of discrimination, but contends that the challenged affirmative action promotions in the CFD' survive strict scrutiny and are constitutional.

Chicago FireFighters Union v. City of Chicago, No. 87 C 7295

The plaintiffs in this action are Local 2 and the following individual plaintiffs: John M. Craven, Larry W. Anoman, Tedmund Duber, Timothy A. Andersen, Todd A. Lewandowski, Michael J. Kammerer, Robert S. Muir, James W. Fisher and Michael Centracchio. Plaintiff Craven, Anoman, Duber, Andersen, Lewandowski, Kammerer and Muir claim that their promotions to the rank of fire engineer from the promotion list following the 1985 engineer exam #40001 were unconstitutionally delayed as a result of the City s affimative action policies. Plaintiff Centracchio alleges that he was denied a promotion to fire engineer from the 1985 exam list for the same reason. The City contends its actions were constitutionally permissible and denies that plaintiffs Kammerer, Anoman and Centracchio have standing to bring this action because, according to the City, they were not injured by the City's affirmative action policies. Plaintiff Fisher claims that his promotion to the rank of fire captain from the list following the 1987 captain exam #68737 was unconstitutionally delayed as a result of the City s affirmative action policies which the City contends were constitutionally permissible.

Chicago FireFighters Union v. City of Chicago,
No. 89 C 7984

The plaintiffs in this action are Local 2 and the following individual plaintiffs: John T. Marolda, Edward A. Porter, John O'Hara, Joseph Lambert, John Floodas, Gerald Peck, John Fitzgerald and Mark Poland. Plaintiffs Marolda, Porter, O'Hara, Lambert, Floodas and Peck claim that their promotions to battalion chief from the list following the battalion chief exam #88001 were unconstitutionally delayed as a result of the City's affirmative action policies. Plaintiffs Fitzgerald and Poland allege that they were unconstitutionally denied promotions to battalion chief for the same reason. Defendant contends its actions were constitutionally permissible and denies that plaintiff Poland has standing to bring this action.

Holland v. City of Chicago, No. 93 C 5438

The plaintiffs in this action are Local 2 and the following individual plaintiffs: Martin Holland, William McGrane, James Mungovan, Robert Hoehn, Patrick Brennen, John Gilmartin, Joseph Muscolino, Raymond Bronke, James O'Donnell and James Clarke who allege that their promotions to fire captain from the list following the 1991 captain exam #39104 were unconstitutionally delayed as a result of the City's affirmative action policies which the City contends were constitutionally permissible.

McMahon v. City of Chicago, No. 93 C 6175

The plaintiffs in this case are Local 2 and the following individual plaintiffs: Brian McMahon, Eamonn O'Connell, Donald Hroma, Kenneth Nasadowski, Thomas Welch, Richard Drezek, Guy McAndrew, Daniel DeGryse, Richard Temple, Daniel Leland, Patrick Sweeney, Terrance Whirity, John Fleischhacker, Michael Oliver, Robert Anthony, John Brennen, Joseph Christensen, Wayne Carter, Edward Carone, James Clarke, Edward Doherty, Martin F. Gaughin, Ralph

McMullen, Mark Owsianiak, Robert Pillon, Jr., Tom Gustafson, James Hannon, John McErlean, Michael Norris, Jeffrey Heinz, James Byrne, Gerald Hamburg, Kevin Kennelly, Stan Pavilonis, Robert Gallapo, Glen Lyman, Warren Stahmer, Robert Griffin, Nicholas Infante, John F. Kelly, Daniel O'Connell, Keith Bozenda, John F. McDonaugh, Richard Gustafson, and James Soludczyk. These plaintiffs claim that their promotions to fire lieutenant from the list following the 1993 lieutenant exam #39202 were unconstitutionally delayed as a result of the City's affirmative action policies which the City contends were constitutionally permissible. These plaintiffs also purport to bring a claim under the Civil Rights Act of 1964, as amended, ("Title VII") 42 U.S.C. § 2000e-2(1). In this claim, plaintiffs allege that the City's practice of promoting out of rank order, but within bands of scores (also known as "banding"), is the equivalent of race norming, a practice the plaintiffs contend was barred by Section 106 of the Civil Rights Act of 1991. The City also contends that banding is not the equivalent of race norming and that Section 106 of the Civil Rights Act of 1991 does not prohibit or limit the City's use of banding, particularly in conjunction with what the City contends is its lawful affirmative action. Defendant City also denies that plaintiffs, with the exception of Richard Temple, have standing to bring a claim under Title VII.

Molinari v. City of Chicago, No. 96 C 0808

The plaintiffs in this action are Local 2 and the following plaintiffs: Robert Molinari, Francis McCann, Raymond Kappel, Jr., John L. McErlean, James Holtz, Scott Malito, Kenneth Graham, Herbert Johnson, Michael Spangelo, Anthony Gumpert, Robert Jurewicz, Ronald Michi, George Ryback, Victor Walchuk, Kevin McKendry, Edward Ruder, Edward Budill, Albert W. Mirza, Peter Eck and William Gavin and they claim that their promotions to fire engineer from the list following the 1994 engineer exam #39305 were

unconstitutionally delayed as a result of the City's affirmative action policies which the City contends were constitutionally permissible. Defendant City denies that plaintiffs Michi, Johnson, Graham and McErlean were injured as a result of the City's affirmative action policies and, consequently, the City denies that those plaintiffs have standing to bring this action.

TRIAL STIPULATIONS OF UNCONTESTED FACTS IN THE CASES

The parties agreed to stipulations regarding numerous facts which this court now adopts as uncontested. (Stip. p.__, ¶ ___."). The stipulated facts which the parties considered pertinent to all the cases consolidated for trial are as follows:

1. Between 1955 and 1996, the following individuals have served as Mayor of the City of Chicago: Richard J. Daley: 1955-76; Michael Bilandic: 1976-79; Jayne Byrne: 1979-83; Harold Washington: 1983-1987; Eugene Sawyer: 1987-89; Richard M. Daley: 1989 to present.

2. Between 1957 and 1996, the following individuals have served as Commissioner of the Chicago Fire Department: Robert J. Quinn: 1957-78; Richard Albrecht: 1978-81; William Blair: 1981-83; Louis Galante: 1983-89; Raymond Orozco: 1989-96. The Commissioner of the Chicago Fire Department ("CFD") serves at the pleasure of the Mayor of the City of Chicago.

3. Six promotional examinations are the subject of these consolidated proceedings, to wit: 1985 engineer exam #40001, 1987 captain exam #68737, 1989 battalion chief exam #88001, 1991 captain exam #39104, 1993 lieutenant exam #39202, 1994 engineer exam #39305.

4. In connection with these six promotional examinations, and through January 1, 1997, the City of Chicago has awarded 286 promotions to minorities, and of these 286

promotions to minorities, 224 promotions were claimed by the City to be justified on the basis of affirmative action.

5. The career service ranks within the CFD consist of the positions of firefighter, engineer, lieutenant, captain and battalion chief. The rank of captain is the group eligible to take the promotional examination for battalion chief; the rank of lieutenant is the group eligible to take the promotional examination for captain; the ranks of firefighter and engineer are the groups eligible to take the promotional examination for lieutenant; and the rank of firefighter is the group eligible to take the promotional examination for engineer.

6. Historically within the CFD the promotional process from one rank to a higher rank has involved an examination, and promotional examinations have consisted of one or more of the following components: written, oral, performance or practical, efficiency and seniority, and these examination components are assigned various weights by the City in arriving at a final score.

7. Historically within the CFD the process of gaining admission to the uniformed service, into the entry level position of firefighter, has involved an examination, and entrance examinations have consisted of one or more of the following components: written (test of reading comprehension), physical fitness, and medical.

8. Between January, 1974 and July, 1995, CFD firefighter entrance examinations were subject to consent decrees entered into in *U.S.A. v. City of Chicago*, No. 73 C 661 (N.D.111.) [Plaintiffs Exhibits 82A-82D], and in connection with the 1974, 1978 and 1985 CFD firefighter entrance examinations, the exams involved a pass-fail written test of reading comprehension and a physical fitness test.

9. Firefighter entrance examinations for the position of CFD firefighter are administered by the City of Chicago's Department of Personnel, not the CFD.

10. In the event any plaintiff is awarded backpay in this proceeding, and where applicable, such plaintiff shall also receive any wage or salary increases that may be negotiated between Chicago Fire Fighters Union Local No. 2 and the City of Chicago that is retroactive to July 1, 1995 and later, if the backpay that is awarded in this proceeding covers a period of time from on and after July 1, 1995.

11. With respect to any backpay that may be awarded to any plaintiff in this proceeding, the parties stipulate that such backpay is subject to regular and normal withholding taxes.

12. With respect to any backpay that may be awarded to any plaintiff in this proceeding, the parties stipulate that such backpay is subject to regular and normal contributions to the Firemen's Annuity and Benefit Fund of Chicago by the respective parties.

13. With respect to the backpay amounts that the parties have stipulated to, the parties further stipulate that in the event any plaintiff is awarded backpay in this proceeding, pre-judgment interest is allowed.

14. In the event this Court admits defendant's exhibits 51 or 52, the parties agree, with respect to the 1986 fire lieutenant promotional examination #60003, that examination is being challenged on constitutional grounds in a separate proceeding known as *Chicago Fire Fighters Union, Local No. 2 v. City of Chicago*, No. 88 C 3773, pending in the United States District Court for the Northern District of Illinois.

STIPULATIONS OF UNCONTESTED
FACTS IN CASE NUMBER 87 C 7295

The specific uncontested facts relating to this case are as follows:

1985 Fire Engineer Examination #40001

1. The 1985 fire engineer promotional exam #40001 was announced on August 15, 1984. Applications for the 1985

fire engineer examination were taken between August 15, 1984 and September 28, 1984. All firefighters with one year's seniority and a class C drivers license were eligible to take that examination.

2. Fire engineer promotional examination #40001 was developed and administered by the City's Department of Personnel. Fire engineer promotional examination #40001 consisted of three parts, a written multiple choice test, a pump simulator test and credit for seniority.

3. Prior to conducting fire engineer promotional examination #40001, the City scrutinized the components of the examination process in an attempt to insure that the examination was job-related and as valid as possible. The City also scrutinized the examination components to insure that the examination was developed in accordance with EEOC Guidelines. The City retained outside expert advice in connection with the testing process. The City also consulted with a representative of the United States Department of Justice in connection with the testing process.

4. Prior to the administration of fire engineer promotional examination #40001, the City made available to potential applicants a list of the resources and reference materials to assist in preparing for the examination. Prior to the administration of that examination, the CFD offered an eight-hour classroom-type training program to applicants to assist in their preparation for the written component of the examination.

5. During the years 1984 and 1985 the number of uniformed members of the CFD holding the rank of firefighter ranged between 3,035 and 3,095, respectively; among those firefighters 78% (between 2,368 to 2,417) were white, 17.8% (between 541 to 550) were black, and 4.1% (between 126 to 128) were Hispanic.

6. During the years 1986 and 1987 the number of uniformed members of the CFD holding the rank of fire engineer ranged between 455 and 436, respectively.

7. A total of 1,165 firefighters applied to take fire engineer promotional examination #40001. Of those, 787 (67%) were white, 265 (22.7%) were black 83 (7.1 %) were Hispanic, and 30 (2.6%) were classified as Other.

8. A total of 1,035 firefighters actually took the written component of fire engineer promotional examination #40001. Of those, 727 (70.2%) were white, 239 (23.1%) were black and 69 (6.7%) were Hispanic.

9. The written component of fire engineer promotional examination #40001 was administered on January 19, 1985. The written component, which consisted of 100 multiple choice questions, was graded on a pass/fail basis.

10. The raw scores on the written component revealed that that portion of fire engineer promotional examination #40001 had an adverse impact on black and Hispanic candidates based on the 80% rule of the EEOC's Uriform Guidelines for Employee Selection Procedures, 29 C.F.R. § 1607.4(D). Under the 80% rule, if the success rate of a protected group on an examination is less than 80% of the success rate of whites, the examination is considered to have adverse impact.

11. To minimize the adverse impact of the written component of fire engineer promotional examination #40001, the City standardized the scores by race. This process sometimes is referred to as "race norming." This is a statistical procedure that involved converting the mean scores and standard deviations of the white, black and Hispanic test takers to a single mean and standard deviation.

12. A standardized score of 60 was set as the passing score on the written component of fire engineer promotional

examination #40001. At a standardized score of 60, 554 candidates passed the written component of the examination. Of those 554, 391 were white, 125 were black and 38 were Hispanic.

13. Because some candidates had a raw score of 60 but a standardized score below 60, the passing score on the written component of fire engineer promotional examination #40001 was revised to include either a standardized score of 60 or a raw score of 60. This revised scoring resulted in 63 additional white candidates passing (whose raw scores were 60 or higher) the written component. With these additional 63, the total number of candidates who passed the written component of fire engineer promotional examination #40001 was 617.

14. The second component of the fire engineer promotional examination #40001 was a pump simulator test, which was a practical "hands on" test that was administered to applicants who had passed the written component. The practical component of the examination #40001 attempted to simulate the most critically important duty of a CFD fire engineer, which is to supply a pressurized stream of water at the scene of a fire.

15. The City undertook an evaluation and review of the pump simulator component of office engineer promotional examination #40001 before it was administered. This review included a pilot study using incumbent fire engineers, including white, black and Hispanic fire engineers. The primary purpose of the pilot study was to determine whether the pump simulator test would yield a range of scores and whether alternatives for that component could be considered the same test. Another reason for the pilot study was to determine whether the pump simulator approach had an adverse impact on minorities when given to incumbent engineers. This pilot study could not predict whether the actual pump simulator test results would have an adverse impact on minorities.

16. The pump simulator component of fire engineer promotional examination #40001 was administered from July 20, 1985 through January 31, 1986.

17. Five hundred fifty-seven (557) of the 617 applicants who passed the written component of fire engineer promotional examination #40001 and were therefore eligible to take the pump simulator test actually took the pump simulator test. Of those 557, 410 (73.6%) were white, 112 (20.1%) were black and 35 (6.3%) were Hispanic.

18. The passing score on the pump simulator component of fire engineer promotional examination #40001 was set at 70. Four hundred sixty-eight (468) candidates passed the pump simulator test. Of those, 357 (76%) were white, 85 (18.2%) were black and 26 (5.5%) were Hispanic. There was no adverse impact under the 80% rule for blacks and Hispanics when comparing their passing rates on the pump simulator test (75.9% and 74.3%, respectively) with the white passing rate (87.1 %).

19. The candidates were permitted to use one of two pump simulators, either the Waterous or the Hale. Because those who chose the Waterous simulator on average scored better than those who chose the Hale simulator, the scores on the Hale simulator were standardized to the mean and standard deviation of the scores on the Waterous simulator.

20. The score on the pump simulator component constituted 90% of the final score on fire engineer promotional examination #40001. The remaining 10% of the final score on the fire engineer promotional examination #40001 was based on seniority. From a base score of 70 points, each candidate received one additional point for each month of continuous service as a uniformed member of the CFD, up to a maximum of 100 points.

21. The City of Chicago developed an eligible list for fire engineer promotional examination #40001, listing in rank order, by cumulative score, the 468 firefighters who attained

a final passing score of 70 or above on fire engineer promotional examination #40001. Anyone who scored above the passing score of 70 on that examination was considered eligible for promotion.

22. The eligible list derived from fire engineer promotional examination #40001 became official on or about May 8, 1986.

23. On June 5, 1986, then Fire Commissioner Louis T. Galante issued Personnel Order ("P.O.") 86-006, effective June 16, 1986. P.O. 86-006 included 50 promotions to the rank of fire engineer. All 50 of those promotions were made in rank order from the eligible list based on fire engineer promotional examination #40001. This first round of promotions from the eligible list based on fire engineer promotional examination #40001 did not have an adverse impact on blacks or Hispanics under the 80% rule, comparing the number of candidates promoted in the first round with the number of candidates who took the pump simulator test, broken down by racial groups.

24. On December 25, 1986, then fire Commissioner Galante issued P.O. 86-024, effective January 16, 1987. P.O. 86-024 included 33 promotions to the rank of fire engineer. All 33 of those promotions were made in rank order from the eligible list based on fire engineer promotional examination #40001. When the number of candidates of each race promoted was compared with the number of candidates of each race who took the pump simulator test, there was adverse impact against minorities under the 80% rule. However, if the first and second groups of promoted candidates were pooled together for a comparison with the group that took the pump simulator test, there was no adverse impact against minorities under the 80% rule.

25. Of the first 83 rank order promotions to fire engineer based on the results of fire engineer promotional examination

#40001, 19 promotions went to minorities (15 blacks and 4 Hispanics).

26. In a June 16, 1987 letter, then Commissioner of Personnel Jesse E. Hoskins recommended to then Fire Commissioner Louis T. Galante that the third set of promotions from the eligible list derived from fire engineer promotion examination #40001 be made on an affirmative action basis, with the goal that 20% of the candidates promoted to fire engineer would be black and an additional 5% of those promoted would be Hispanic.

27. On August 6, 1987, then Fire Commissioner Galante issued P.O. Order 87-017, effective August 16, 1987. P.O. 87-017 included 56 promotions to the rank of fire engineer. Forty eight (48) of those 56 candidates were promoted in rank order from the eligible list based on fire engineer promotional examination #40001. The last eight of those promotions were made out of rank order from the eligible list and claimed by the City to be justified for affirmative action reasons as stated in the June 16, 1987 letter from Commissioner Hoskins to Commissioner Galante. The eight (8) candidates who received affirmative action promotions are:

A. Personnel Order 87-017 (eff. 8/16/87)

NAME	RACE	SCORE	RANK	DOH
R. Southern	Black	96.6925	168	11/16/78
A. Fletcher	"	94.8904	218	11/16/78
J. Charles	"	94.5125	222	
J. Smith	"	94.3525	227	07/16/77
A. Sanders	"	94.0038	239	02/01/82
D. Walcott	"	93.9925	240	11/16/78
J. Hunter	"	93.9194	242	02/01/82
R. Lester	"	93.7852	245	10/10/78

28. Subsequent to August 16, 1987, the date when Personnel Order 87-017 became effective, there were 11

more personnel orders issued by the CFD (through Personnel Order 92-025, effective January 1, 1993), making 223 promotions to fire engineer from fire engineer promotional eligible list #40001. Of these 223 promotions, 50 were made on a non-rank order basis and claimed by the City to be justified for the reasons articulated in the June 16, 1987 letter from Commissioner Hoskins to Commissioner Galante. Of these 50 affirmative action, non-rank order promotions, 37 promotions went to black firefighters and 13 to Hispanic firefighters. Specifically:

A. Personnel Order 87-023 (eff. 12/1/87)

NAME	RACE	SCORE	RANK	DOH
W. Mumford	Black	96.6299	171	02/20/80
S. Marquez	Hisp.	96.1694	187	02/20/80
W. Turner	Black	96.0625	192	02/19/80
W. Christian	"	93.0256	266	03/01/80
T. Tyler	"	92.8852	267	10/11/78

B. Personnel Order 88-006 (eff. 5/1/88)

NAME	RACE	SCORE	RANK	DOH
J. Reyes	Hisp.	94.8304	218.5	11/16/78
J. Williams	Black	92.7494	270	02/16/77
R. Clay	"	92.7011	271	02/19/80
A. Turner	"	92.0471	277	02/15/80

C. Personnel Orders 88-1/011A (eff. 7/1/88)

NAME	RACE	SCORE	RANK	DOH
M. Perez	Hisp.	92.8546	268	10/16/78
R. Ortega	"	92.8506	269	02/19/80
R. Redmond	Black	91.8446	282	11/16/78
J. Thompson	"	91.5681	286	02/19/80
L. Dillard	"	90.0606	302	
D. Simmons	"	89.0144	316	02/19/80
S. Knox	"	88.7838	320	02/19/80
T. Cross	Black	88.5490	322	02/01/83

D. Personnel Order 89-014 (eff. 8/16/89)*

NAME	RACE	SCORE	RANK	DOH
T. Cole	Black	88.0421	326	02/16/77
V. Walters	"	87.9865	327	09/04/79
L. Leftridge	"	87.7994	328	02/20/80
G. Strader	"	87.2167	333	02/19/80
C. Rhodes	"	86.7891	338	02/01/83
R. Atkins	"	86.1757	341	10/16/78
R. Cox-Bey	"	85.4209	345	02/18/80
C. Vasquez	Hisp.	84.7933	351	02/19/80
A. Charleston	Black	83.2681	362	12/22/73
A. Pennix	"	83.2440	363	02/19/80
M. Johnson	"	82.7453	372	02/15/80
H. Solano	Hisp.	81.0349	389	02/20/80
F. DeAvila	"	80.6839	393	10/16/78

*Steven Pinkney (black), whose score was 84.3380 and rank was 355, was offered a promotion to the rank of fire engineer and his name appeared on P.O. 89-014. However, Mr. Pinkney was no longer employed by the CFD at the time that the promotions on P.O. 89-014 became effective. Thus, Mr. Pinkney never reached the rank of fire engineer.

E. Personnel Order 90-009 (eff. 4/1/90)

NAME	RACE	SCORE	RANK	DOH
S. Rainey	Black	81.4441	382	10/10/78
W. Kendrick	"	81.2696	385	02/01/83
J. Lamar	"	80.6047	395	07/16/77
C. Singleton	"	80.4877	397	02/16/77
M. Holmes	"	80.4259	398	10/10/78
J. Aguinaga	Hisp.	80.2872	400	02/20/80
M. Oliver	Black	80.0523	404	02/01/83
L. PonceD'Leon	Hisp.	78.9771	411	02/19/80

F. Personnel Orders 90-025/025A (eff. 11/16/90)

NAME	RACE	SCORE	RANK	DOH
J. Graham	Black	85.2308	348	02/01/83
R. White	"	80.6212	394	02/01/83
M. Williams	"	78.6771	413	02/19/80
M. Raso	Hisp.	77.5554	420	02/18/80

G. Personnel Order 91-010 (eff. 5/1/91)

NAME	RACE	SCORE	RANK	DOH
A. White	Black	78.3406	416	08/08/77
L. Hearon	"	76.6600	426	09/04/79
H. Jacinto	Hisp.	76.2476	431	02/20/80

H. Personnel Order 91-018 (eff. 8/1/91)

NAME	RACE	SCORE	RANK	DOH
H. Ashford	Black	73.1471	448	11/16/78
C. Norwood	"	72.2246	454	02/01/82
M. Cajigas	Hisp.	71.7445	457	02/01/83

I. Personnel Order 92-025 (eff. 1/1/93)

NAME	RACE	SCORE	RANK	DOH
R. Venegas	Hisp.	71.1325	460	02/19/80
R. Brewer	Black	70.1310	465	10/16/78

29. On December 23, 1992, then Fire Commissioner Orozco issued P. 0. 92-025, effective January 1, 1993. P.O. No. 92-025 included the following 23 promotions to the rank of fire engineer based on the results of fire engineer promotional examination #40001: P. Carolan (white), whose rank was 368; J. Muzzillo (white), whose rank was 376; T. Mintle (white), whose rank was 377; R. Engel (white), whose rank was 378; K. Bernaciak (white), whose rank was 379; R. Hardt (white), whose rank was 380; R. Hirtzer (white), whose rank was 381; L. Ross (white), whose rank was 383; D. Ryder (white), whose rank was 384; L. Ahern (white), whose rank

was 387; R. Luedtke (white), whose rank was 388; M. Thomas (white), whose rank was 399; T. Linane (white), whose rank was 403; R. Schroeder (white), whose rank was 405; J. Pewinski (white), whose rank was 406; R. Jansky (white), whose rank was 407; P. Dillon (white), whose rank was 408; J. Roche (white), whose rank was 409; E. Mueller (white), whose rank was 415; K. Doran (white), whose rank was 418; B. Bottger (white), whose rank was 419; R. Venegas (Hispanic), whose rank was 460; and R. Brewer (black), whose rank was 465.

30. No further promotions were made to fire engineer from the list based on fire engineer promotional examination #40001 after January 1, 1993.

31. All of the candidates promoted out of rank order from the list based on fire engineer promotional examination #40001 were eligible to be promoted to the rank of fire engineer because they received a passing score of 70 or higher on the test.

32. A total of 362 promotions to fire engineer were offered and accepted between June of 1986 and January of 1993 during the life of the eligible list based on fire engineer promotional examination #40001. Of those 362 promotions, 276 went to whites, 66 went to blacks and 20 went to Hispanics.

33. Plaintiff John M. Craven was born in Chicago on March 5, 1959, and plaintiff Craven's race is white. Plaintiff Craven, who was hired by the City of Chicago on January 2, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Craven's cumulative score on fire engineer promotional examination #40001 was 96.7760, and plaintiff Craven's numerical ranking on fire engineer promotion eligible list #40001 was 165. Effective August 16, 1987, the eight (8) minority firefighters identified in paragraph 27A, each of whom had a lower numerical ranking on fire engineer promotion eligible

list #40001 than did plaintiff Craven, were promoted to fire engineer, but plaintiff Craven was passed over for promotion. Plaintiff Craven was promoted to fire engineer effective May 1, 1988. The difference in earnings between a firefighter (FI) at salary step 6 ($2,703.50/month) and a fire engineer (F3) at salary step 6 ($2,871.50/month) for the 8.5 months between August 16, 1987 through April 30, 1988, amounts to *$1,428.00.*

34. Plaintiff Larry W. Anoman was born in Chicago on January 26, 1953, and plaintiff Anoman's race is white. Plaintiff Anoman, who was hired by the City of Chicago in February 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Anoman's cumulative score on fire engineer promotional examination #40001 was 96.6934, and plaintiff Anoman's numerical ranking on fire engineer promotion eligible list #40001 was 167. Effective August 16, 1987, the eight (8) minority firefighters identified in paragraph 27A, each of whom had a lower numerical ranking on fire engineer promotion eligible list #40001 than did plaintiff Anoman, were promoted to fire engineer. Plaintiff Anoman waived promotion to fire engineer on May 1, 1988. Thereafter, plaintiff Anoman waived two (2) more fire engineer promotion offers, and plaintiff Anoman was removed from the eligible list based on fire engineer promotional examination #40001.

35. Plaintiff Tedmund Duber was born on April 9, 1952, and plaintiff Duber's race is white. Plaintiff Duber, who was hired by the City of Chicago on December 16, 1978, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Duber's cumulative score on fire engineer promotional examination #40001 was 96.6348, and plaintiff Duber's numerical ranking on fire engineer promotion eligible list #40001 was 170. Of the eight (8) minority firefighters identified in paragraph 27A who were promoted to fire engineer effective August 16,

1987, seven (7) had lower numerical rankings on fire engineer promotion eligible list #40001 than did plaintiff Duber, but plaintiff Duber was passed over for promotion. Plaintiff Duber was promoted to fire engineer effective May 1, 1988. The difference in earnings between a firefighter (F1) at salary step 6 ($2,703.50/month) and a fire engineer (F3) at salary step 6 ($2,871.50/month) for the 8.5 months between August 16, 1987 through April 30, 1988, amounts to *$1,428.00*.

36. Plaintiff Timothy A. Andersen was born in Chicago on September 20, 1956, and plaintiff Andersen's race is white. Plaintiff Andersen, who was hired by the City of Chicago on February 15, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Andersen's cumulative score on fire engineer promotional examination #40001 was 96.5531, and plaintiff Andersen's numerical ranking on fire engineer promotion eligible list #40001 was 172. Of the eight (8) minority firefighters identified in paragraph 27A who were promoted to fire engineer effective August 16, 1987, seven (7) had lower numerical rankings on fire engineer promotion eligible list #40001 than did plaintiff Andersen, but plaintiff Andersen was passed over for promotion. Plaintiff Andersen was promoted to fire engineer effective May 1, 1988. The difference in earnings between a firefighter (F1) at salary step 6 ($2,703.50/month) and a fire engineer (F3) at salary step 6 ($2,871.50/month) for the 8.5 months between August 16, 1987 through April 30, 1988, amounts to *$1,428.00*.

37. Plaintiff Todd A. Lewandowski was born in Chicago on September 12, 1956, and plaintiff Lewandowski's race is white. Plaintiff Lewandowski, who was hired by the City of Chicago on February 1, 1983, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Lewandowski's cumulative score on fire engineer promotional examination #40001 was 96.5262, and

plaintiff Lewandowski's numerical ranking on fire engineer promotion eligible list #40001 was 173. Of the four (4) minority firefighters identified in paragraph 28B who were promoted to fire engineer effective May 1, 1988, all four (4) had lower numerical rankings on fire engineer promotion eligible list #40001 than did plaintiff Lewandowski, but plaintiff Lewandowski was passed over for promotion. Plaintiff Lewandowski was promoted to fire engineer effective July 1, 1988. The difference in earnings between a firefighter (F1) at salary step 6 ($2,703.50/month) and a fire engineer (F3) at salary step 6 ($2,871.50/month) for the two (2) months between May 1, 1988 through June 30, 1988, amounts to *$336.00*.

38. Plaintiff Michael J. Kammerer was born in Chicago on September 8, 1952, and plaintiff Kammerer's race is white. Plaintiff Kammerer, who was hired by the City of Chicago on November 16, 1978, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Kammerer's cumulative score on fire engineer promotional examination #40001 was 96.4956, and plaintiff Kammerer's numerical ranking on fire engineer promotion eligible list #40001 was 174. Of the four (4) minority firefighters identified in paragraph 28B who were promoted to fire engineer effective May 1, 1988, all four (4) had lower numerical rankings on fire engineer promotion eligible list #40001 than did plaintiff Kammerer. Plaintiff Kammerer waived promotion to fire engineer based on fire engineer promotional examination #40001 twice, on June 22, 1988 and June 30, 1988. Both of those offered promotions would have been effective July 1, 1988. Plaintiff Kammerer was promoted to fire engineer effective August 16, 1989, having accepted the third offer of promotion.

39. Plaintiff Robert S. Muir was born in Chicago on December 6, 1953, and plaintiff Muir's race is white. Plaintiff Muir, who was hired by the City of Chicago on October 16,

1978, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Muir's cumulative score on fire engineer promotional examination #40001 was 94.4675, and plaintiff Muir's numerical ranking on fire engineer promotion eligible list #40001 was 175. Of the four (4) minority firefighters identified in paragraph 28B who were promoted to fire engineer effective May 1, 1988, all four (4) had lower numerical rankings on fire engineer promotion eligible list #40001 than did plaintiff Muir, but plaintiff Muir was passed over for promotion. Plaintiff Muir was promoted to fire engineer effective July 1, 1988. The difference in earnings between a firefighter (F1) at salary step 6 ($2,703.50/month) and a fire engineer (F3) at salary step 6 ($2,871.50/month) for the two (2) months between May 1, 1988 through June 30, 1988, amounts to *$336.00*.

40. Plaintiff Michael Centracchio was born in Chicago on August 29, 1952, and plaintiff Centracchio's race is white. Plaintiff Centracchio, who was hired by the City of Chicago on February 18, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Centracchio's cumulative score on fire engineer promotional examination #40001 was 77.4390, and plaintiff Centracchio's numerical ranking on fire engineer promotion eligible list #40001 was 421. Of the two (2) minority firefighters identified in paragraph 28I, who were promoted to fire engineer effective January 1, 1993, they both had lower scores and lower numerical rankings on fire engineer promotion eligible list #40001 than did plaintiff Centracchio.

41. Plaintiffs Craven, Duber, Andersen, Lewandowski and Muir would have been promoted to fire engineer off of fire engineer promotional eligible list #40001 on the dates specified except that the promotions that these plaintiffs would otherwise have received were awarded to minority firefighters and claimed by the City to be justified as affirmative action promotions.

1987 Fire Captain Examination #68737

42. The 1987 fire captain promotional examination #68737 was announced on August 8, 1986. Applications for the 1987 fire captain examination were taken between August 8, 1986 and September 8, 1986. Persons holding the rank of fire lieutenant were eligible to take that examination.

43. Fire captain promotional examination #68737 was developed and administered by the City's Department of Personnel. Fire captain promotional examination #68737 consisted of three parts, a written multiple-choice test, an oral board and interview and credit for seniority.

44. In July 1978, the Department of Personnel started a content validation study of the job of fire captain in the CFD in order to construct a promotional test for that position.

45. Content validity is one of the types of validation recognized by the American Psychological Association in its "Standards for Educational and Psychological Tests and Manuals." According to the APA Standards, comment validity is achieved by developing test items that sample critical knowledge, skills and abilities present in the job domain under review.

46. The Department of Personnel uses job content as a source of knowledge and skill to be tested in an examination. To define job content for fire captain promotional examination #68737, the Department of Personnel conducted a job analysis.

47. The process used to do the job analysis in fire captain promotional examination #68737 is detailed in "The Report on the Validation of the fire captain examination of 1986," which was prepared by staff at the Department of Personnel.

48. The job analysis procedures used by the City in the construction of fire captain promotional examination #68737 were professionally recognized and developed procedures

that complied with the Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures.

49. After the job analysis was conducted, the tasks, knowledge, skills and abilities identified, and the source materials examined, a joint committee of persons in the CFD and Department of Personnel prepared the test items.

50. Some of the original items created by this committee were deleted prior to the examination because it was determined that they were less relevant to the important duties of captain than the Departments of Personnel and Fire would like.

51. Training sessions were conducted at City colleges prior to the holding of the examination.

52. Each applicant also was provided with source materials to study for the examination by the CFD. These source materials consisted, in part, of the rules and regulations of the CFD, citations to specific general orders, operating procedures, and bulletins.

53. The oral component of the examination was designed to measure and evaluate knowledge of skills and abilities that were important to the position of fire captain.

54. Like the job analysis and the development of the written portion of the examination, the oral examination questions were developed by a joint committee of CFD personnel and Department of Personnel staff.

55. The nine (9) oral board raters who graded the oral board examinations were commanders serving in exempt rank positions in the CFD. Each candidate was evaluated by two of these raters.

56. The City consulted with the United States Department of Justice in connection with the testing process for fire captain promotional examination #68737.

57. During the years 1985 and 1986 the number of uniformed members of the CFD holding the rank of fire lieutenant ranged between 640 and 643, respectively; among these lieutenants 88% to 90% (between 577 to 570) were white, 7.5% to 9% (between 48 to 58) were black, and 2.3% (15) were Hispanic.

58. During the years 1986 and 1987 the number of uniformed members of the CFD holding the rank of fire captain ranged between 204 and 196, respectively.

59. A total of 577 fire lieutenants applied to take fire captain promotional examination #68737. Of those, 496 were white (86%), 63 (10.9%) were black and 18 (3.1 %) were Hispanic.

60. A total of 543 fire lieutenants actually took the written component of fire captain promotional examination #68737. Of those, 463 (85.3%) were white, 63 (11.6%) were black and 17 (3.1%) were Hispanic.

61. The written component of fire captain promotional examination #68737 was given on September 20, 1986 and September 27, 1986. Two equivalent forms of that test were administered.

62. All candidates who took the written component of fire captain promotional examination #68737 were eligible to take the oral board component, which was administered in February and March of 1987.

63. A total of 506 out of the 543 who took the written component also took the oral board component of fire captain promotional examination #68737.

64. In scoring the oral board component of fire captain promotional examination #68737, the Department of Personnel standardized the scores by rater to account for the differences in the difficulty level of different raters (ie., some

raters tended to be harder graders than others). This standardization was not based on race.

65. The third component of fire captain promotional examination #68737, seniority, was calculated by the Department of Personnel based on City personnel records showing each candidate's seniority.

66. The results of fire captain promotional examination #68737 were weighted as follows: 65% written, 25% oral and 10% seniority. The passing score was set at 70.

67. The City of Chicago developed an eligible list for fire captain-promotional examination #68737, listing in rank order, by cumulative score, the 341 fire lieutenants who attained passing scores of 70 or above on fire captain promotional examination #68737. Of the 341 lieutenants that passed the examination, 283 were white, 42 were black and 16 were Hispanic. Under the 80% rule in the EEOC Guidelines, there would have been no adverse impact on minorities had promotions from fire captain promotional eligibility list #68737 been made on a rank order basis. Among the top 150 fire lieutenants on fire captain promotional eligible list #68737, 18.7% are minorities.

68. The eligible list derived from fire captain promotional examination #68737 became official in June, 1987, with the cancellation of the 1978 fire captain eligible list #8149.

69. In a July 9, 1987 letter, then Commissioner of Personnel Jesse E. Hoskins recommended to then Fire Commissioner Louis T. Galante that the promotions made from the eligible list derived from fire captain promotional examination #68737 be made on an affirmative action basis, with a goal that 20% of the candidates promoted to fire captain would be black and an additional 5% of those promoted would be Hispanic.

70. Between October 16, 1987 and April 1, 1992, there were nine (9) personnel orders issued by the CFD, making

161 promotions to the ranks of fire captain from fire captain promotional eligible list #68737. Of these 161 promotions to the rank of fire captain from fire captain promotional eligible list #68737, 25 were made on a non-rank order basis and claimed by the City to be justified for the reasons articulated in the July 9, 1987 letter from then Commissioner of Personnel Jesse E. Hoskins to then Fire Commissioner Louis T. Galante. Of these 25 affirmative action, non-rank order promotions, 16 promotions went to black fire lieutenants and nine (9) to Hispanic fire lieutenants, to wit:

A. Personnel Order 87-019 (eff. 10/16/87)

NAME	RACE	SCORE	RANK	DOH
M. Bautista	Hisp.	83.63	40	07/16/77

B. Personnel Order 88-006 (eff. 5/1/88)

NAME	RACE	SCORE	RANK	DOH
P. Soto	Hisp.	83.30	45	10/16/66

C. Personnel Order 88-011/11A (eff. 7/1/88)

NAME	RACE	SCORE	RANK	DOH
D. Smith	Black	82.42	67	12/22/73
L. Muse	"	82.19	73	02/16/77
A. Alvarez	Hisp.	81.29	88	12/16/70
N. Diaz	"	80.83	96	02/16/77

D. Personnel Order 89-015 (eff. 8/16/89)

NAME	RACE	SCORE	RANK	DOH
J. Sanchez	Hisp.	79.47	127	02/16/77
W. Boyer	Black	79.32	131	12/16/70
A. Khan	"	78.69	140	07/16/77
E. Cox	"	78.59	142	07/16/77
T. Monegan	"	78.22	148	01/01/68
C. Johnson	"	78.01	151	07/16/77
W. Wrenn	Hisp.	77.21	178	02/16/77

E. Personnel Order 90-009 (eff. 4/1/90)

NAME	RACE	SCORE	RANK	DOH
J. Winbush	Black	77.89	155	07/16/65
R. Smith	Black	77.81	158	09/02/69
P. Richardson	"	77.74	160	07/16/77
J. Ponce Dleon	Hisp.	74.83	235	07/18/77

F. Personnel Order 90-024 (eff. 11/1/90)

NAME	RACE	SCORE	RANK	DOH
M. Davenport	Black	77.55	163	07/16/77
C. Holland	"	77.52	164	09/02/69

G. Personnel Order 91-010 (eff. 5/1/91)

NAME	RACE	SCORE	RANK	DOH
J. Smith	Black	77.28	174	07/16/77
D. Gault	"	77.15	181	03/01/77
J. Alatorre	Hisp.	71.48	309	08/08/77

H. Personnel Order 92-007 (eff. 4/1/92)

NAME	RACE	SCORE	RANK	DOH
R. Carroll	Black	76.82	188	05/16/62
J. Paramore	"	76.03	207	02/16/77
G. Rabiela	Hisp.	71.37	314	02/16/77

71. On March 23, 1992, then Fire Commissioner Raymond E. Orozco issued P.O. 92-007, effective April 1, 1992. P.O. 92-007 included the following 18 promotions to the rank of fire captain based on the results of fire captain promotional examination #68737: R. Miller (white), whose rank was 133; W. Burks (white), whose rank was 141; G. Meyers (white), whose rank was 144; E. Klinger (white), whose rank was 146; Paul Sobczak (white), whose rank was 139; W. Crowley (white), whose rank was 143; E. Ruhnke (white), whose rank was 150; T. Groh (white), whose rank was 134; H. Scavone (white), whose rank was 138; J. Mindak

(white), whose rank was 147; L. McAleer (white), whose rank was 137; P. Fitzpatrick (white), whose rank was 145; D. Cipriani (white), whose rank was 149; R. Graf (white), whose rank was 136; E. Tetzner (white), whose rank was 135; R. Carroll (black), whose rank was 188; G. Rabiela (hispanic), whose rank was 314; and J. Paramore (black), whose rank was 207.

72. No further promotions were made to the rank of fire captain from the eligible list based on fire captain promotional examination #68737 after April 1, 1992.

73. All candidates promoted on a non-rank order basis from the list based on fire captain promotional examination #68737 were eligible to be fire captains because they received a passing score of 70 or higher on the test.

74. A total of 161 promotions to fire captain were offered and accepted between October 16, 1987 and April 1, 1992. Of these 161 promotions, 121 went to whites, 31 went to blacks and nine (9) went to Hispanics.

75. Plaintiff James Fisher, who was hired by the City of Chicago on September 2, 1969, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Fisher's cumulative score on fire captain promotional examination #68737 was 84.86, and plaintiff Fisher's numerical ranking on fire captain promotion eligible list #68737 was 24. Effective October 16, 1987, the one (1) minority fire lieutenant identified in paragraph 70A, who had a lower numerical ranking on fire captain promotion eligible list #68737 than did plaintiff Fisher, was promoted to fire captain, but plaintiff Fisher was passed over for promotion. Plaintiff Fisher was promoted to fire captain effective May 1, 1988. The difference in earnings between afire lieutenant (F4) at salary step 8 ($3,466.25/month) and a fire captain (F5) at salary step 8 ($3,905.75/month) for the 6.5 months between October 16, 1987 through April 30, 1988, amounts to *$2,856.75*.

76. Plaintiff Fisher would have been promoted to fire captain off of fire captain promotional eligibility list #68737 on October 16, 1987, except that the promotion that plaintiff Fisher would otherwise have received was awarded to the minority firefighter identified in paragraph 70A and claimed by the City to be justified as an affirmative action promotion.

STIPULATIONS OF UNCONTESTED FACTS IN CASE NUMBER 89 C 7984

The specific uncontested facts relating to this case are as follows:

1989 Fire Battalion Chief Examination #88001

1. The 1989 fire battalion chief promotional examination #88001 was announced on April 8, 1988. Persons holding the rank of fire captain were eligible to take that examination. Applications were mailed to all those eligible to take the test.

2. Fire battalion chief promotional examination #88001 was developed and administered by the City's Department of Personnel. Fire battalion chief promotional examination #88001 consisted of three parts, a written multiple-choice test, an oral board interview and credit for seniority.

3. In 1988, a job analysis was conducted for the job of battalion chief. This involved determining from subject matter experts (incumbent fire battalion chiefs) the tasks and duties of the job. The subject matter experts then evaluated the tasks in terms of importance to the job. Based on these identified tasks, the subject matter experts determined the knowledge, skills and abilities ("KSA's") needed for the battalion chief position. These KSA's, after being evaluated in terms of importance, were used to develop specific test items.

4. The announcement for fire battalion chief promotional examination #88001 included a list of primary source materials for that test. This list contained CFD general orders,

special directives, memos and bulletins identified as important to the job of fire battalion chief.

5. The City made available to all applicants for fire battalion chief promotional examination #88001 an instructional course at Malcolm X College.

6. Battalion chiefs are the highest ranking career service officers in the CFD. battalion chiefs have significant and unique duties and responsibilities. The decisions of battalion chiefs affect the lives of the public and CFD personnel under their command.

7. A total of 209 fire captains applied to take fire battalion chief promotional examination #88001. Of those, 185 (88.5%) were white, 19 (9.1%) were black and 5 (2.4%) were Hispanic.

8. During the years 1988 and 1989 the number of uniformed members of the CFD holding the rank of fire captain ranged between 221 and 243, respectively; among these captains 93.6% to 90% (between 207 to 219) were white, 4.9% to 7.4% (between 11 and 18) were black, and 1.3% to 2.4% (between 3 and 6) were Hispanic.

9. A total of 206 candidates completed all portions of fire battalion chief examination #88001. Of those, 183 (88.8%) were white, 18(8.7%) were black and 5(2.4%) were Hispanic.

10. The written component of fire battalion chief examination #88001 was given on March 11,1989.

11. All candidates who took the written component of fire battalion chief promotional examination #88001 were eligible to take the oral board component, which was given over a five week period. The oral board component consisted of five (5) ratings. The first four (4) ratings were based on the candidate's responses to particular question items and the fifth rating was based on the candidate's oral communication skills. There was a pool of three (3) questions that an oral

board rater could ask for each of the four (4) individual test items. The oral board raters chose one question from those four (4) pools for each candidate. The multiple forms of the oral board questions were designed to cover equivalent KSA's.

12. There was no statistically significant difference among race groups based on the average raw score on the written component of fire battalion chief promotional examination #88001, and minorities had a higher average raw score on that component than did whites. Under the 80% rule in the EEOC Guidelines, however, there was adverse impact against black and Hispanic candidates on the written component until a score of 89.

13. There were no statistically significant differences among race groups based on the average raw score on the oral board component of fire battalion chief promotional examination #88001. However, there were statistically significant differences on the oral board component based on the week a candidate took that part of the test. The oral board raw scores were standardized by week to adjust for this difference. Also, there were statistically significant differences among questions that the oral board raters selected from the question pool. Those differences in question difficulty were corrected by standardization. Neither of these standardization processes was based on race.

14. The third component of fire battalion chief promotional examination #88001, seniority, was calculated by the Department of Personnel based on City personnel records showing each candidate's seniority. Using only seniority as a rank order selection device would have had an adverse impact against minorities. Just based on seniority, 48 of the first 49 candidates would be white and 16 of the 18 minorities who took the test would be in the bottom.

15. The results of fire battalion chief promotional examination #88001 were weighted as follows: 65% written, 25% oral and 10% seniority. The passing score was set at 70.

16. Under the 80% rule in the EEOC Guidelines, there was adverse impact against minorities until rank 90 on the eligible list derived from fire battalion chief promotional examination #88001.

17. During the years 1988 and 1989 the number of uniformed members of the CFD holding the rank of fire battalion chief ranged between 145 and 131, respectively.

18. The City developed an eligible list for fire battalion chief promotional examination #88001, listing in rank order, by cumulative score, the 170 fire captains who attained passing scores of 70 or above on fire battalion chief promotional examination #88001.

19. The eligible fist derived from fire battalion chief promotional #88001 became official in July of 1989.

20. In a July 26, 1989 letter, Commissioner of Personnel Glenn E. Carr recommended to then Fire Commissioner Raymond E. Orozco that promotions from the eligible list derived from fire battalion chief promotional examination #88001 be made on an affirmative action basis.

21. In a July 14, 1992 letter, Commissioner Carr notified then Commissioner Orozco that affirmative action promotions from the eligible list derived from fire battalion chief promotion examination #88001 were still warranted and recommended that subsequent promotions from that list should be made at a ratio of 20% over the black and Hispanic composition of the rank below (i.e., fire captain).

22. Between August 1, 1989, and January 1, 1995, there were 10 personnel orders issued by the CFD, making 107 promotions to fire battalion chief from fire battalion chief promotional eligible list #88001. Of these 107 promotions to battalion chief, 16 were made on a non-rank order basis and

claimed by the City to be justified for reasons articulated in the July 14, 1992 letter and/or the July 26, 1989 letter from Commissioner Carr to Commissioner Orozco. Of these 16 affirmative action, non-rank order promotions, 12 promotions went to black fire captains and four (4) to Hispanic fire captains, to wit:

A. Personnel Order89-011 (eff. 8/1/89)

NAME	RACE	SCORE	RANK	DOH
J. Boatner	Black	89.39	60	02/01/73
C. Harris	"	88.71	72	06/01/64
N. Diaz Hisp.	"	87.46	84	02/16/77
P. Soto	"	87.06	87	10/16/66

B. Personnel Order 90-009 (eff. 4/1/90)

NAME	RACE	SCORE	RANK	DOH
C. Burns	Black	88.73	71	02/16/77

C. Personnel Order 90-014 (eff. 7/1/90)

NAME	RACE	SCORE	RANK	DOH
L. Jackson	Black	88.66	73	

D. Personnel Order 90-024 (eff.11/1/90)

NAME	RACE	SCORE	RANK	DOH
K. Wideman	Black	88.60	74	07/16/77

E. Personnel Order 91-010 (eff. 5/1/91)

NAME	RACE	SCORE	RANK	DOH
D. Smith	Black	88.03	79	12/22/73

F. Personnel Order 91-018 (eff. 8/1/91)

NAME	RACE	SCORE	RANK	DOH
H. West	Black	86.96	89	02/16/77

G. Personnel Order 92-013 (eff. 7/16/92)

NAME	RACE	SCORE	RANK	DOH
G. Lewis	Black	85.66	102	07/16/77

H. Personnel Order 92-025 (eff. 1/1/93)

NAME	RACE	SCORE	RANK	DOH
A. Alvarez	Hisp.	85.78	98	12/16/70
F. Morgan	Black	84.93	104	

I. Personnel Order 93-014 (eff. 8/16/93)

NAME	RACE	SCORE	RANK	DOH
L. Muse	Black	83.63	113	02/16/77
L. Cooks	Black	83.34	116	07/16/77
M. Bautista	Hisp.	83.14	118	07/16/77

J. Personnel Order 94-024 (eff. 1/1/95)

NAME	RACE	SCORE	RANK	DOH
G. Boston	Black	80.15	135	02/16/77

23. No further promotions were made to fire battalion chief from the eligible list based on fire battalion chief promotional examination #88001 after January 1, 1995.

24. All of the candidates promoted out of rank order from the list based on fire battalion chief promotional examination #88001 were eligible to be fire battalion chiefs because they received a passing score of 70 or higher on that test.

25. A total of 107 promotions to fire battalion chief were offered and accepted between August 1, 1989 and January 1, 1995. Of those 107 promotions, 88 went to whites, 15 went to blacks and four (4) went to Hispanics.

26. Plaintiff John Marolda was born in Evergreen Park on March 11, 1942, and plaintiff Marolda's race is white.

Plaintiff Marolda, who was hired by the City of Chicago on August 16, 1966, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Marolda's cumulative score on fire battalion chief promotional examination #88001 was 90.34, and plaintiff Marolda's numerical ranking on fire battalion chief promotion eligible list #88001 was 52. Effective August 1, 1989, the four (4) minority fire captains identified in paragraph 22A, who had lower numerical rankings on fire battalion chief promotion eligible list #88001 than did plaintiff Marolda, were promoted to fire battalion chief, but plaintiff Marolda was passed over for promotion. Plaintiff Marolda was promoted from fire captain to fire battalion chief effective April 1, 1990. The difference in earnings between a fire captain (F5) at salary step 9 ($4,186.00/month) and a fire battalion chief (F6) at salary step 9 ($4,580.50/month) for the eight (8) months between August 1, 1989 through March 31, 1990, amounts to *$3,183.17*.

27. Plaintiff Edward A. Porter was born in Chicago on September 28, 1946, and plaintiff Porter's race is white. Plaintiff Porter, who was hired by the City of Chicago on February 1, 1973, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Porter's cumulative score on fire battalion chief promotional examination #88001 was 90.26, and plaintiff Porter's numerical ranking on fire battalion chief promotion eligible list #88001 was 54. Effective August 1, 1989, the four (4) minority fire captains identified in paragraph 22A, who had lower numerical rankings on fire battalion chief promotion eligible list #88001 than did plaintiff Porter, were promoted to fire battalion chief, but plaintiff Porter was passed over for promotion. Plaintiff Porter was promoted from fire captain to fire battalion chief effective July 1, 1990. The difference in earnings between a fire captain (F5) at salary step 8 ($4,063.50/month) and a fire battalion chief (F6) at salary

step 8 ($4,456.00/month) for the 11 months between August 1, 1989 through June 30, 1990, amounts to *$4,354.53*.

28. Plaintiff John O'Hara was born in Chicago on December 12, 1930, and plaintiff O'Hara's race is white. Plaintiff O'Hara, who was hired by the City of Chicago on September 19, 1955, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff O'Hara's cumulative score on fire battalion chief promotional examination #88001 was 86.89, and plaintiff O'Hara's numerical ranking on fire battalion chief promotion eligible list #88001 was 90. Effective January 1, 1993, the two (2) minority fire captains identified in paragraph 22H, who had lower numerical rankings on fire battalion chief promotion eligible list #88001 than did plaintiff O'Hara, were promoted to fire battalion chief, but plaintiff O'Hara was passed over for promotion. Plaintiff O'Hara was promoted from fire captain to fire battalion chief effective August 16, 1993. The difference in earnings between a fire captain (F5) at salary step 11 ($5,386.50/month) and a fire battalion chief (F6) at salary step 11 ($5,797.00/month) for the 7.5 months between January 1, 1993 through August 15, 1993, amounts to *$3,154.35*. Plaintiff O'Hara, upon reaching mandatory retirement age within the CFD, retired from active duty as a battalion chief with the CFD on December 12, 1993, and the retirement annuity that plaintiff O'Hara receives from the Chicago Firemen's Annuity and Benefit Fund is less per month than the amount of the monthly annuity he would have received had plaintiff O'Hara's promotion to battalion chief not been delayed by 7.5 months.

29. Plaintiff Joseph Lambert was born in Chicago on June 3, 1942, and plaintiff Lambert's race is white. Plaintiff Lambert, who was hired by the City of Chicago on September 2, 1969, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Lambert's cumulative score on fire battalion chief promotional exam-

ination #88001 was 85.28, and plaintiff Lambert's numerical ranking on fire battalion chief promotion eligible list #88001 was 103. Effective August 16, 1993, the three (3) minority fire captains identified in paragraph 221, who had lower numerical rankings on fire battalion chief promotion eligible list #88001 than did plaintiff Lambert, were promoted to fire battalion chief, but plaintiff Lambert was passed over for promotion. Plaintiff Lambert was promoted from fire captain to fire battalion chief effective January 1, 1995. The difference in earnings between a fire captain (F5) at salary step 9 (rising from $5,098.00/month to $5,302.00/month) and a fire battalion chief (F6) at salary step 9 (rising from $5,577.50/month to $5,800.50/month) for the 16.5 months between August 16, 1993 through December 31, 1994, amounts to *$8,303.34*.

30. Plaintiff John Floodas was born in Chicago on February 2, 1943, and plaintiff Floodas's race is white. Plaintiff Floodas, who was hired by the City of Chicago on December 16, 1965, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Floodas's cumulative score on fire battalion chief promotional examination #88001 was 84.87, and plaintiff Floodas's numerical ranking on fire battalion chief promotion eligible list #88001 was 105. Effective August 16, 1993, the three (3) minority fire captains identified in paragraph 221, who had lower numerical rankings on fire battalion chief promotion eligible list #88001 than did plaintiff Floodas, were promoted to fire battalion chief, but plaintiff Floodas was passed over for promotion. Plaintiff Floodas was promoted from fire captain to fire battalion chief effective January 1, 1995. The difference in earnings between a fire captain (F5) at salary step 10 (rising from $5,253.00/month to $5,463.00/month) and a fire battalion chief (F6) at salary step 10 (rising from $5,715.00/month to $5,943.50/month) for the 16.5 months between August 16, 1993 through December 31, 1994, amounts to *$8,002.29*.

31. Plaintiff Gerald Peck's race is white. Plaintiff Peck, who was hired by the City of Chicago on October 16, 1966, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Peck's cumulative score on fire battalion chief promotional examination #88001 was 84.82, and plaintiff Peck's numerical ranking on fire battalion chief promotion eligible list #88001 was 106. Effective August 16, 1993, the three (3) minority fire captains identified in paragraph 221, who had lower numerical rankings on fire battalion chief promotion eligible list #88001 than did plaintiff Peck, were promoted to fire battalion chief, but plaintiff Peck was passed over for promotion. Plaintiff Peck was promoted from fire captain to fire battalion chief effective January 1, 1995. The difference in earnings between a fire captain (F5) at salary step 10 (rising from $5,253.00/month to $5,463.00/month) and a fire battalion chief (F6) at salary step 10 (rising from $5,715.00/month to $5,943.50/month) for the 16.5 months between August 16, 1993 through December 31, 1994, amounts to *$8,002.29*.

32. Plaintiff John Fitzgerald was born in Chicago on February 4, 1943, and plaintiff Fitzgerald's race is white. Plaintiff Fitzgerald, who was hired by the City of Chicago on November 1, 1968, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Fitzgerald's cumulative score on fire battalion chief promotional examination #88001 was 84.22, and plaintiff Fitzgerald's numerical ranking on fire battalion chief promotion eligible list #88001 was 109. Effective January 1, 1995, the one (1) minority fire captain identified in paragraph 22J, who had a lower numerical ranking on fire battalion chief promotion eligible list #88 001 than did plaintiff Fitzgerald, was promoted from fire captain to fire battalion chief, but plaintiff Fitzgerald was passed over for promotion. The City of Chicago made no further promotions from fire battalion chief promotion eligible list #88001 after the

promotions to battalion chief on Personnel Order 94-024 that became effective on January 1, 1995, and battalion chief promotion eligible list #88001 was retired thereafter and plaintiff Fitzgerald was not promoted to battalion chief off that list. The difference in earnings between a fire captain (F5) at salary step 10 ($5,572.50/month) and a fire battalion chief (F6) at salary step 10 ($6,062.50/month) for the 27 months between January 1, 1995 through March 31, 1997 amounts to *$13,230.00*.

33. Each of the seven (7) plaintiffs identified in paragraphs 26 through 32, inclusive, would have been promoted to fire battalion chief off of fire battalion chief promotional eligibility list #88001 on the dates specified except that the promotions that these plaintiffs would otherwise have received were awarded to minority fire captains and claimed by the City to be justified as affirmative action promotions.

STIPULATIONS OF UNCONTESTED FACTS IN CASE NUMBER 93 C 5438

The specific uncontested facts relating to this case are as follows:

1991 Fire Captain Examination #39104

1. The 1991 fire captain promotional examination #39104 was announced on July 23, 1991. Applications for the 1991 fire captain examination were taken between July 23, 1991 and September 4,1991.

2. Fire captain promotional examination #39104 was developed and administered by the City's Department of Personnel. Fire captain promotional examination #39104 consisted of three parts, a written multiple-choice test, an oral board and interview and credit for seniority.

3. In June of 1991, a panel of representatives from the Department of Personnel and subject matter experts

(incumbent battalion chiefs and deputy district chiefs) met and reviewed and revised the list of tasks for the job of fire captain that was generated during the development of the 1987 fire captain promotional examination #68737.

4. The panel then rated each of the tasks as to criticality (i.e., whether a fire captain needs to be able to perform the task on the first day he is promoted).

5. Next, the panel assigned each critical task to one of the five categories that were used in developing the 1987 fire captain examination: Administration, Fire Ground Procedures, Tactics and Other Responses, Personnel Supervision, Training and Miscellaneous. The panel also adopted the weighting for each category that was used in the development of the 1987 fire captain examination. The panel then divided the tasks into one of the five categories. No task was placed in the Miscellaneous category.

6. Thereafter, the panel reviewed and revised the knowledge, skills and abilities ("KSA's") for the job of fire captain generated during the 1987 fire captain examination process. The panel rated each of the KSA's in terms of importance.

7. Finally, the panel grouped each important KSA into one or more of the job dimension categories.

8. In July of 1991, a panel of representatives of the Department of Personnel and subject matter experts (six (6) fire captains and one (1) battalion chief) met to link the critical tasks with the source materials proposed for use in developing the fire captain promotional examination #39104. A source material could be linked to more than one task.

9. Only those sources linked to critical tasks were used to develop the Study Guide published with the announcement for fire captain promotional examination #39104. Only materials identified in the Study Guide were used to construct examination items.

10. During the years 1991 and 1992 the number of uniformed members of the CFD holding the rank of fire lieutenant ranged between 701 and 686, respectively; among those lieutenants 84.5% to 83.6% (between 593 to 574) were white, 11.2% to 12.2% (between 79 and 84) were black, and 4.1 % to 4% (between 29 and 28) were Hispanic.

11. During the years 1991 and 1992 the number of uniformed members of the CFD holding the rank of fire captain ranged between 225 and 217, respectively.

12. A total of 557 fire lieutenants took the written multiple choice component of fire captain promotional examination #39104. Of those, 447 (80.25%) were white, 80 (14.36%) were black, 28 (5.03%) were Hispanic and two (2) (0.36%) were classified as Other.

13. The written component of fire captain promotional examination #39104 was given on September 7, 1991.

14. All candidates who took the written component of fire captain promotional examination #39104 were eligible to take the oral board component, which was administered between November 20, 1991 and December 19, 1991. The oral board component consisted of four categories of questions and an overall rating. Each category had a pool of five questions and the two raters, exempt members of the CFD, asked each one question from each of the categories.

15. A total of 528 candidates took the oral board component of fire captain promotional examination #39104. Of those, 420 (79.55%) were white, 79 (14.96%) were black, 27 (5.11%) were Hispanic and two (2) were in other racial categories. The two (2) who fell into other racial categories were included as whites for purposes of analyzing the results of the oral board component.

16. There were no statistically significant differences among race groups on the written component of fire captain promotional examination #39104. Under the 80% rule in the

EEOC Guidelines, there was adverse impact against minorities at the top of the list based on the raw scores on the written component. For Hispanics, adverse impact continued until a written score of 85. For blacks, adverse impact occurred until a written score of 83.

17. There were no statistically significant differences among race groups based on the average raw score on the oral board component of fire captain promotional examination #39104. However, there were a statistically significant differences on the oral board component based on the week a candidate took that part of the test. The oral board raw scores were standardized by week to adjust for this difference. Also, there were a statistically significant differences among questions that the oral board raters selected from the question pool. The difference in question difficulty was corrected by standardization. In addition, there were statistically significant differences among raters. To account for the fact that some raters were harder graders than others, the oral board scores were standardized by rater. None of these standardization processes was based on race.

18. Seniority scores were calculated by crediting one point per month of active service to a maximum of 30 and adding that total to a base of 70. Thus, all candidates who took this examination had at least two and a half years of active service and received a score of 100 on the seniority component.

19. The results of fire captain promotional examination #39104 were weighted as follows: 45% written, 45% oral and 10% seniority. The passing score was set at 70.

20. The City of Chicago developed an eligible list for fire captain promotional examination #39104, listing in rank order, by cumulative score, the 383 fire lieutenants who attained passing scores of 70 or above on fire captain promotional examination #39104.

21. The candidates were notified of the results of fire captain promotional examination #39104 in May of 1992.

22. In a July 14, 1992 letter, Commissioner of Personnel Glenn E. Carr recommended to then Fire Commissioner Raymond E. Orozco that affirmative action promotions from the eligible list derived from fire captain promotional examination #39104 were warranted and proposed that subsequent promotions from that list should be made at a ratio of 20% over the black and Hispanic composition of the rank below (i.e., fire lieutenant).

23. The eligible list based on fire captain promotional examination #39104 is still active.

24. Between July 16, 1992, and March 1, 1997, there were eight (8) personnel orders issued by the CFD, making 117 promotions to fire captain from fire captain promotional eligibility list #39104. Of these 117 promotions to fire captain from fire captain promotional eligibility list #39104, 18 promotions were made on a non-rank order basis and claimed by the City to be justified for reasons articulated in Commissioner Carr's July 14, 1992 letter to then Commissioner Orozco. Of these 18 affirmative action, non-rank order promotions, 12 promotions went to black fire lieutenants and six (6) to Hispanic fire lieutenants, to wit:

A. Personnel Order 92-013 (eff. 7/16/92)

NAME	RACE	SCORE	RANK	DOH
D. Jackson	Black	94.78	19	11/16/78

B. Personnel Order 92-025 (eff. 1/1/93)

NAME	RACE	SCORE	RANK	DOH
D. McGill	Black	93.59	26	02/19/80
S. Knox	"	93.36	28	02/19/80
J. Vega	Hisp.	89.74	81	02/14/80

C. Personnel Order 93-014 (eff. 8/16/93)

NAME	RACE	SCORE	RANK	DOH
W. Monroe	Black	91.45	50	02/19/80
C. Powell	"	91.11	57	02/19/80

D. Personnel Order 95-016 (eff. 8/1/95)

NAME	RACE	SCORE	RANK	DOH
G. Berdell	Black	90.26	70	02/20/80
S. Marquez	Hisp.	88.77	98	02/20/80

E. Personnel Order 95-025 (eff.1/1/96)

NAME	RACE	SCORE	RANK	DOH
G. Gurrola	Hisp.	88.50	101	02/16/85
C. Mosqueda	"	88.30	105	03/01/77
J. Shelton	Black	88.21	107	02/15/80
A. Thomas	"	87.81	116	02/14/80

F. Personnel Order 96-015 (eff. 7/1/96)

NAME	RACE	SCORE	RANK	DOH
L. Outlaw	Black	87.63	118	11/16/78

G. Personnel Order 96-028 (eff. 1/1/97)

NAME	RACE	SCORE	RANK	DOH
J. Santiago	Hisp.	88.01	113	09/04/79
D. Rice	Black	86.95	127	02/16/77
J. Thompson	"	86.75	130	02/19/80

H. Personnel Order 96-008 (eff. 3/1/97)

NAME	RACE	SCORE	RANK	DOH
T. Tyler	Black	86.16	140	10/11/78
M. Sanchez	Hisp.	84.84	163	09/04/79

25. All of the candidates promoted out of rank order from the list based on fire captain promotional examination #39104 were eligible to be fire captains because they received a passing score of 70 or higher on that test.

26. A total of 109 promotions to fire captain were offered and accepted between July 16, 1992 and January 1, 1997 from the eligible list based on fire captain promotional examination #39104. Of those 109 promotions, 85 went to whites, 18 went to blacks and five (5) went to Hispanics.

27. Plaintiff Martin Holland was born in Chicago on November 13, 1948, and plaintiff Holland's race is white. Plaintiff Holland, who was hired by the City of Chicago on June 16, 1971, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Holland's cumulative score on fire captain promotional examination #39104 was 94.31, and plaintiff Holland's numerical ranking on fire captain promotion eligible list #39104 was 21. Effective January 1, 1993, the three (3) minority fire lieutenants identified in paragraph 24B, who had lower numerical rankings on fire captain promotion eligible list #39104 than did plaintiff Holland, were promoted to fire captain, but plaintiff Holland was passed over for promotion. Plaintiff Holland was promoted from fire lieutenant to fire captain effective August 16, 1993. The difference in earnings between a fire captain (F5) at salary step 9 ($5,098.00/month) and a fire lieutenant (F4) at salary step 9 ($4,532.00/month) for the 7.5 months between January 1, 1993 through August 16, 1993, amounts to *$4,356.64*.

28. Plaintiff Robert Hoehn was born in Chicago on January 8, 1939, and plaintiff Hoehn's race is white. Plaintiff Hoehn, who was hired by the City of Chicago on August 16, 1966, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Hoehn's cumulative score on fire captain promotional examination #39104 was 94.08, and plaintiff Hoehn's numerical ranking on fire captain promotion eligible list #39104 was 22. Effective January 1, 1993, the three (3) minority fire lieutenants identified in paragraph 24B, who had lower numerical rankings on fire captain promotion eligible list #39104 than

did plaintiff Hoehn, were promoted to fire captain, but plaintiff Hoehn was passed over for promotion. Plaintiff Hoehn was promoted from fire lieutenant to fire captain effective August 16, 1993. The difference in earnings between a fire captain (F5) at salary step 10 ($5,253.00/month) and a fire lieutenant (F4) at salary step 10 ($4,678.00/month) for the 7.5 months between January 1, 1993 through August 16, 1993, amounts to *$4,425.62*.

29. Plaintiff Patrick Brennan was born in Chicago on March 7, 1958, and plaintiff Brennan's race is white. Plaintiff Brennan, who was hired by the City of Chicago on February 18, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Brennan's cumulative score on fire captain promotional examination #39104 was 94.08, and plaintiff Brennan's numerical ranking on fire captain promotion eligible list #39104 was 23. Effective January 1, 1993, the three (3) minority fire lieutenants identified in paragraph 24B, who had lower numerical rankings on fire captain promotion eligible list #39104 than did plaintiff Brennan, were promoted to fire captain, but plaintiff Brennan was passed over for promotion. Plaintiff Brennan was promoted from fire lieutenant to fire captain effective August 16, 1993. The difference in earnings between a fire captain (F5) at salary step 7 ($4,800.00/month) and a fire lieutenant (F4) at salary step 7 ($4,256.50/month) for the 7.5 months between January 1, 1993 through August 16, 1993, amounts to *$4,183.40*.

30. Plaintiff William McGrane was born in Waukegan, Illinois on October 31,1944, and plaintiff McGrane's race is white. Plaintiff McGrane, who was hired by the City of Chicago February 16, 1969, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff McGrane's cumulative score on fire captain promotional examination #39104 was 91.95, and plaintiff McGrane's numerical ranking on fire captain promotion

eligible list #39104 was 47. Effective August 16, 1993, the two (2) minority fire lieutenants identified in paragraph 24C, who had lower numerical rankings on fire captain promotion eligible list #39104 than did plaintiff McGrane, were promoted to fire captain, but plaintiff McGrane was passed over for promotion. Plaintiff McGrane was promoted from fire lieutenant to fire captain effective August 1, 1995. The difference in earnings between a fire captain (F5) at salary step 9 (rising from $5,098/month to $5,302/month) and step 10 (rising from $5,463/month to $5,572.50/month), and a fire lieutenant (F4) at salary step 9 (rising from $4,532/month to $4,713.50/month) and step 10 (rising from $4,865/month to $4,962.50/month), for the 23.5 months between August 16, 1993 through August 1, 1995, amounts to *$13,978.75*.

31. Plaintiff James Mungovan was born in Chicago on December 1, 1957, and plaintiff Mungovan's race is white. Plaintiff Mungovan, who was hired by the City of Chicago on February 18, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Mungovan's cumulative score on fire captain promotional examination #39104 was 91.90, and plaintiff Mungovan's numerical ranking on fire captain promotion eligible list #39104 was 48. Effective August 16, 1993, the two (2) minority fire lieutenants identified in paragraph 24C, who had lower numerical rankings on fire captain promotion eligible list #39104 than did plaintiff Mungovan, were promoted to fire captain, but plaintiff Mungovan was passed over for promotion. Plaintiff Mungovan was promoted from fire lieutenant to fire captain effective August 1, 1995. The difference in earnings between a fire captain (F5) at salary step 7 (rising from $4,800/month to $5,092/month) and step 8 ($5,249/month), and a fire lieutenant (F4) at salary step 7 (rising from $4,256.50/month to $4,515.50/month) and step 8 ($4,658/month), for the 23.5 months between August 16, 1993 through August 1, 1995, amounts to *$13,525.88*.

32. Plaintiff John Gilmartin was born in Chicago on July 19, 1950, and plaintiff Gilmartin's race is white. Plaintiff Gilmartin, who was hired by the City of Chicago on November 16, 1978, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Gilmartin's cumulative score on fire captain promotional examination #39104 was 90.60, and plaintiff Gilmartin's numerical ranking on fire captain promotion eligible list #39104 was 65. Effective August 1, 1995 the two (2) minority fire lieutenants identified in paragraph 24D, who had lower numerical rankings on fire captain promotion eligible list #39104 than did plaintiff Gilmartin, were promoted to fire captain, but plaintiff Gilmartin was passed over for promotion. Plaintiff Gilmartin was promoted from fire lieutenant to fire captain effective January 1, 1996. The difference in earnings between a fire captain (F5) at salary step 8 ($5,249.00/month) and a fire lieutenant (F4) at salary step 8 ($4,658.00/month) for the 5 months between August 1, 1995 through January 1, 1996, amounts to *$2,955.00*.

33. Plaintiff Joseph Muscolino was born in Chicago on May 2, 1955, and plaintiff Muscolino's race is white. Plaintiff Muscolino, who was hired by the City of Chicago on October 10, 1978, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Muscolino's cumulative score on fire captain promotional examination #39104 was 90.37, and plaintiff Muscolino's numerical ranking on fire captain promotion eligible list #39104 was 66. Effective August 1, 1995 the two (2) minority fire lieutenants identified in paragraph 24D, who had lower numerical rankings on fire captain promotion eligible list #39104 than did plaintiff Muscolino, were promoted to fire captain, but plaintiff Muscolino was passed over for promotion. Plaintiff Muscolino was promoted from fire lieutenant to fire captain effective January 1, 1996. The difference in earnings between a fire captain (F5) at salary

step 8 ($5,249.00/month) and a fire lieutenant (F4) at salary step 8 ($4,658.00/month) for the five (5) months between August 1, 1995 through January 1, 1996, amounts to *$2,955.00*.

34. Plaintiff Raymond J. Bronke was born in Chicago on June 26, 1933, and plaintiff Bronke's race is white. Plaintiff Bronke, who was hired by the City of Chicago on June 16, 1960, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Bronke's cumulative score on fire captain promotional examination #39104 was 89.18, and plaintiff Bronke's numerical ranking on fire captain promotion eligible list #39104 was 92. Effective January 1, 1996, the four (4) minority fire lieutenants identified in paragraph 24E, who had lower numerical rankings on fire captain promotion eligible list #39104 than did plaintiff Bronke, were promoted to fire captain, but plaintiff Bronke was passed over for promotion. Plaintiff Bronke was promoted from fire lieutenant to fire captain effective July 1, 1996. The difference in earnings between a fire captain (F5) at salary step 11 ($5,714.00/month) and a fire lieutenant (F4) at salary step 11 ($5,112.00/month) for the six (6) months between January 1, 1996 through June 30, 1996, amounts to *$3,612.00*.

35. Plaintiff James O'Donnell was born in Chicago on June 14, 1957, and plaintiff O'Donnell's race is white. Plaintiff O'Donnell, who was hired by the City of Chicago on September 4, 1979, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff O'Donnell's cumulative score on fire captain promotional examination #39104 was 89.07, and plaintiff O'Donnell's numerical ranking on fire captain promotion eligible list #39104 was 93. Effective January 1, 1996, the four (4) minority fire lieutenants identified in paragraph 24E, who had lower numerical rankings on fire captain promotion eligible list #39104 than did O'Donnell, were promoted to fire

captain, but plaintiff O'Donnell was passed over for promotion. Plaintiff O'Donnell was promoted from fire lieutenant to fire captain effective July 1, 1996. The difference in earnings between a fire captain (F5) at salary step 8 ($5,249.00/month) and a fire lieutenant (F4) at salary step 8 ($4,658.00/month) for the six (6) months between January 1, 1996 through June 30, 1996, amounts to *$3,546.00*.

36. Plaintiff James M. Clarke was born in Chicago and plaintiff Clarke's race is white. Plaintiff Clarke, who was hired by the City of Chicago on June 3, 1975, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Clarke's cumulative score on fire captain promotional examination #39104 was 88.08, and plaintiff Clarke's numerical ranking on fire captain promotion eligible list #39104 was 109. Effective January 1, 1997, the three (3) minority fire lieutenants identified in paragraph 24G, who had lower numerical rankings on fire captain promotion eligible list #39104 than did plaintiff Clarke, were promoted to fire captain, but plaintiff Clarke was passed over for promotion. Plaintiff Clarke was promoted from fire lieutenant to fire captain effective March 1, 1997. The difference in earnings between a fire captain (F5) at salary step 9 ($5,408.00/month) and a fire lieutenant (F4) at salary step 9 ($4,808.00/month) for the two (2) months between January 1, 1997 through February 28, 1997, amounts to *$1,200.00*.

37. Each of the ten (10) plaintiffs identified in paragraphs 27 through 36, inclusive, would have been promoted to fire captain off of fire captain promotional eligible list #39104 on the dates specified except that the promotions that these plaintiffs would otherwise have received were awarded to minority members of the CFD and claimed by the City to be justified as affirmative action promotions.

STIPULATIONS OF UNCONTESTED FACTS IN CASE NUMBER 93 C 6175

The specific uncontested facts relating to this case are as follows:

1993 Fire Lieutenant Examination #39202

1. In 1992, the City entered into a contract with a management consulting firm to develop an examination for the rank of fire lieutenant. A written multiple choice test was administered as part of that promotional process on August 22, 1992. An oral board component was scheduled to begin in October of 1992.

2. During the analysis of the written test data, certain test answer sheets could not be located. The City, at the suggestion of Local No. 2, agreed to invalidate the examination and give a new test.

3. Thereafter, the City retained the public accounting firm of Arthur Andersen & Co. to provide oversight and guidance on the development and administration of a new fire lieutenant examination. Arthur Andersen & Co. selected the management consulting firm of HR Strategies, Inc. to develop the test.

4. The 1993 fire lieutenant promotional examination #39202 was announced on December 1, 1992. Applications for fire lieutenant promotional examination #39202 were taken between December 1, 1992 and December 31, 1992. Persons holding the rank of firefighter or fire engineer were eligible to take that examination.

5. Fire lieutenant promotional examination #39202 was developed by HRStrategies, Inc. Arthur Andersen & Co. administered the test and secured the test documents. Fire lieutenant promotional examination #39202 consisted of three parts, a written multiple choice test, an oral board interview and credit for seniority.

6. After gathering background information about the CFD and prior testing procedures, HRStrategies, Inc. did a job analysis of the position of fire lieutenant. This process began by having subject matter experts (incumbent fire lieutenants) determine the tasks and duties of the job. The lieutenants then evaluated the tasks in terms of importance to the job. Important tasks were then grouped into dimensions or categories. Next, higher-ranking subject matter experts (incumbent fire captains and battalion chiefs) determined the knowledge, skills and abilities ("KSA's") required to perform the job of fire lieutenant. These KSA's, after being evaluated in terms of importance, were used to develop specific items for the test, thus ensuring the content validity of the selection device.

7. The four (4) task categories or dimensions and their weights based on their relative importance to the job were Supervision and Administration (23%), Incident Response (45%), Training (20%) and Fire Prevention Inspection (11%). The goal of HRStrategies, Inc. was to develop a test that would be related to these job categories and the KSA's linked to the specific tasks within each job category.

8. The process described above is detailed in the May, 1993 "Technical Report on the Development of a Promotional Examination for Chicago Fire Department Lieutenant," which was prepared by HRStrategies, Inc.

9. The test applicants were provided with a list of source materials to study. These source materials included general orders, CFD memos, special directives and training bulletins. The applicants also were provided with test-taking tips prepared by HRStrategies.

10. HRStrategies, Inc. worked with high-ranking subject matter experts (fire captains and battalion chiefs) to develop the written multiple choice component of fire lieutenant promotional examination #39202. The written component of the test had three (3) parts, an Open Book section, a Closed

Book section and a Work Sample section. Three (3) forms of the written test were created. All three (3) forms contained the same questions but the questions were in different orders.

11. During the years 1992 and 1993 the number of uniformed members of the CFD holding the rank of firefighter ranged between 3032 and 2959, respectively; among these firefighters, 69.5% to 68.9% (between 2107 to 2041) were white, 23.1% to 23.4% (between 702 and 693) were black, and 7.3% to 7.6% (between 223 and 225) were Hispanic. During the years 1992 and 1993 the number of uniformed members of the CFD holding the rank of fire engineer ranged between 502 and 508, respectively; among these fire engineers 82.6% to 82.4% (between 415 to 419) were white, 13.9% (between 70 and 71) were black, and 3.3% to 3.5% (between 17 and 18) were Hispanic.

12. The written component of fire lieutenant promotional examination #39202 was administered on January 30, 1993 to 2,068 candidates who had applied to take the test. Of those, 1,362 (65.9%) were white; 505 (24.4%) were black; 176 (8.5%) were Hispanic; 13 (0.6%) were Asian-American; and 12 (0.6%) were American Indian.

13. Those who passed the written component of fire lieutenant promotional examination #39202 were allowed to take the oral board component. A pass score on the written component was selected that would enable approximately three (3) times as many candidates as were anticipated to be promoted off of the resulting eligible list to advance to the oral board component. At the time the passing score was determined, it was projected that 350 promotions would be made based on fire lieutenant promotional examination #39202. Therefore, a passing score was set that would allow about 1,050 candidates to continue on in the promotional process. That point was the mean of the total distribution of scores. The written score was then converted to a 100-

pointscale in which 70 served as the pass point. This calculation was not based on race.

14. At a score of 70 on the written component, 1,091 (52.7% of all test takers) were allowed to proceed to the oral board component of fire lieutenant promotional examination #39202. Eight (8) of the 13 Asian Americans (61.5%), seven (7) of the 12 American Indians (58.3%), 136 of the 505 African-Americans (26.9%), 73 of the 176 Hispanics (41.5%) and 867 of the 1,362 whites (63.7%) who took the written component passed.

15. HRStrategies, Inc. worked with another group of high-ranking CFD officers who served as subject matter experts to develop the oral board component of fire lieutenant promotional examination #39202. The oral board consisted of three (3) questions. The three (3) questions covered the categories of Supervision and Administration, Training and Incident Response. There were variations on the questions for each category.

16. The oral board component of fire lieutenant promotional examination #39202 was administered between March 2, 1993 and March 20, 1993. Of the 1,091 candidates eligible to take the oral board component, 33 did not take that test and two (2) arrived for the test but withdrew from consideration after the instructions had been read. Of those 35 who did not complete the oral board, one (1) was American Indian and 34 were white.

17. A total of 1,056 candidates completed the oral board component of fire lieutenant promotional examination #39202.

18. To calculate the oral board score, the average of the independent ratings from the three (3) interviewers were taken for each of the three (3) questions. These three (3) oral-board averaged ratings for each candidate were standardized to convert the scores to a common mean and standard

deviation. This process was not based on race. Those standardized oral scores were then converted to a scale in which a score of 100 was the maximum possible and a score of 70 was the pass point. This process also was not based on race.

19. To determine seniority credit, from a base score of 70, one (1) point was added for each month of service on the CFD, up to a maximum of 100 points.

20. The results of fire lieutenant promotional examination #39202 were weighted as follows: 60% written (combined Open and Closed Book 30% and Work Sample 30%), 30% oral, and 10% seniority.

21. Final test results of fire lieutenant promotional examination #39202 had an adverse impact against blacks and Hispanics under the 80% rule in the EEOC Guidelines.

22. The City adopted a banding approach, slightly modified from the one HRStrategies, Inc. recommended, in making promotions based on the results of fire lieutenant promotional examination #39202.

23. In or about May of 1993, an eligible list was created containing the rank order scores of the 1,056 candidates who took both the written and the oral components of fire lieutenant promotional examination #39202.

24. In a December 6, 1993 letter, Commissioner of Personnel Glenn E. Carr recommended to then Fire Commissioner Raymond E. Orozco that promotions from fire lieutenant promotional examination #39202 be made on an affirmative action basis. Commissioner Carr proposed that promotions be made at a ratio 20% over the black and Hispanic composition of the ranks (firefighter and fire engineer) eligible for promotion to fire lieutenant.

25. During the years 1992 and 1993 the number of uniformed members of the CFD holding the rank of fire lieutenant ranged between 686 and 622, respectively.

26. Between August 16, 1993, and January 1,1997, there were nine (9) personnel orders issued by the CFD, making 251 promotions to fire lieutenant from fire lieutenant promotional eligible list #39202. Of these 251 promotions to fire lieutenant 55 promotions were made on a non-rank order basis and claimed by the City to be justified for reasons articulated in the December 6, 1993 letter from Commissioner Carr to Commissioner Orozco. Of these 55 affirmative action, non-rank order promotions, 38 promotions went to blacks and 17 to Hispanics, to wit:

A. Personnel Order 93-014 (eff. 8/16/93)

NAME	RACE	SCORE	RANK	DOH
E. Cerdan	Hisp.	95.07	63	02/18/80
D. Walton	Black	94.64	88	11/16/78
M. Jackson	"	94.11	116	10/10/78
J. Johnson	"	94.02	122	07/16/86
C. Stewart	"	93.91	133	09/01/76
J. Silva	Hisp.	93.91	133	02/17/87

B. Personnel Order 93-022 (eff. 11/16/93)

NAME	RACE	SCORE	RANK	DOH
L. Turner	Black	93.25	166	02/17/87
K. Despiau	"	93.10	176	
R. Rojas	Hisp.	93.07	180	02/19/80
G. Cathcart	Black	92.91	187	07/16/77
A. Nance-Holt	"	92.88	189	12/03/90
L. Howard	"	92.49	213	10/16/78
J. Reyes	Hisp.	92.49	213	11/16/78
B. Greene	Black	92.36	225	07/16/86
M. Townsend	"	92.22	232	12/01/88
R. Clay	"	91.75	271	02/19/80
R. Jones	Black	91.68	275	02/17/87

*Mark Imburgia, who claimed to be Hispanic on CFD records, also received an affirmative action promotion to fire

lieutenant on P.O. 93-022. Imburgia's score was 91.91 and his rank was 257. Thereafter, the City determined that Imburgia was not Hispanic. Consequently, on January 14, 1994, then Fire Commssioner Orozco issued P.O. 94-003, restoring Imburgia to his former rank of firefighter. P.O. 94-003 also promoted Jose Moreno to the rank of fire lieutenant in Imburgia's stead from the eligible list based on fire lieutenant promotional examination #39202, retroactive to November 16, 1993. Moreno (Hispanic) received a score of 91.20 and a rank of 302. Moreno was hired by the CFD on September 4, 1979.

C. Personnel Order 94-018 (eff. 11/1/94)

NAME	RACE	SCORE	RANK	DOH
M. Shaifer	Black	91.64	278	11/01/86
A. Gray	"	91.31	298	02/17/87
A. Peel	"	91.24	301	07/16/77
E. Singleton	"	90.97	318	02/18/80
W. Christian	"	90.84	331	03/01/80
N. Vasquez	Hisp.	90.84	331	02/16/85
C. Ramos	"	90.72	345	11/01/89

D. Personnel Order 95-016/95-016A (eff. 8/1/95)

NAME	RACE	SCORE	RANK	DOH
P. Bozeman	Black	90.83	333	02/18/80
I. Brown	"	90.68	346	02/18/80
R. Lester	"	90.60	352	10/10/78
E. Cortes	Hisp.	90.60	352	05/02/88
D. Billups	Black	90.57	357	02/18/80
L. Williams	"	90.26	380	12/01/88
C. Vasquez	Hisp.	90.01	403	02/19/80
L. Terry	Black	89.88	413	02/17/87
C. Rodriguez	Hisp.	89.83	417	11/01/86
W. Palmer	Black	89.76	427	02/19/80
C. Norwood	Black	89.48	436	02/16/77
D. Hunter	"	89.43	438	02/15/80

E. Personnel Order 95-025 (eff. 1/1/96)

NAME	RACE	SCORE	RANK	DOH
G. MaAyteh	Hisp.	90.46	370	11/01/86
T. Hicks	Black	89.09	457	02/17/87
J. Thomas	"	89.05	462	02/18/80
R. DeJesus	Hisp.	88.93	470	02/22/80
H. Marshall	Black	88.91	473	07/16/86
J. Graham	"	88.89	474	02/01/83
L. Jimenez	Hisp.	88.76	482	02/18/80
J. Ross	Black	88.48	503	11/01/86
D. Yancey	"	88.34	510	12/01/88
R. Cruz	Hisp.	88.15	516	02/07/87

F. Personnel Order 96-010 (eff. 5/16/96)

NAME	RACE	SCORE	RANK	DOH
L. Merrell	Black	88.07	523	02/04/82
L. Mills	"	87.82	534	02/18/80

G. Personnel Order 96-015 (eff. 7/1/96)

NAME	RACE	SCORE	RANK	DOH
J. Villa	Hisp.	87.44	547	01/02/80
A. Pennix	Black	87.41	549	02/01/83
D. Wilson	"	87.29	552	02/01/83
J. Johnson	"	87.22	556	12/17/87

H. Personnel Order 96-028 (eff. 1/1/97)

NAME	RACE	SCORE	RANK	DOH
M. Perez	Hisp.	87.11	562	10/16/78
R. Ortega	"	87.06	566	02/19/80

I. Personnel Order 97-008 (eff. 3/1/97)

NAME	RACE	SCORE	RANK	DOH
R. Cox-Bey	Black	86.96	579	02/18/80
A. Ellis	"	86.59	593	12/03/90
J. DeJesus	Hisp.	86.56	594	10/01/91

27. The eligible list based on fire lieutenant promotional examination #39202 is still active.

28. All of the candidates promoted out of rank order from the list based on fire lieutenant promotional examination #39202 were eligible to be fire lieutenants because they received a passing score of 70 or higher on that test.

29. A total of 251 promotions to fire lieutenant were offered and accepted from August 16, 1993 to January 1, 1997 from the eligible list based on fire lieutenant promotional examination #39202. Of those 251 promotions, 193 went to whites, 40 went to black and 18 went to Hispanics.

30. Plaintiff Donald Hroma, was born in Chicago on May 11, 1965, and plaintiff Hroma's race is white. Plaintiff Hroma, who was hired by the City of Chicago on November 11, 1986, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Hroma's cumulative score on fire lieutenant promotional examination #39202 was 95.20, and plaintiff Hroma's numerical ranking on fire lieutenant promotion eligible list #39202 was 56. Effective August 16, 1993, the six (6) minority CFD members identified in paragraph 27A, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Hroma, were promoted to fire lieutenant, but plaintiff Hroma was passed over for promotion. Plaintiff Hroma was promoted from firefighter to fire lieutenant effective November 16, 1993. The difference in earnings between a fire lieutenant (F4) at salary step 6 ($4,121.00/month) and a firefighter (F1) at salary step 6 ($3,424.50/month) for the three (3) months between August 16, 1993 through November 16, 1993, amounts to *$2,140.88*.

31. Plaintiff Eamonn O'Connell was born in Essex, England on February 14,1957, and plaintiff O'Connell's race is white. Plaintiff O'Connell, who was hired by the City of

Chicago on February 17, 1987, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff O'Connell's cumulative score on fire lieutenant promotional examination #39202 was 95.20, and plaintiff O'Connell's numerical ranking on fire lieutenant promotion eligible list #39202 was 56. Effective August 16, 1993, the six (6) minority CFD members identified in paragraph 27A, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff O'Connell, were promoted to fire lieutenant, but plaintiff O'Connell was passed over for promotion. Plaintiff O'Connell was promoted from firefighter to fire lieutenant effective November 16, 1993. The difference in earnings between a fire lieutenant (F4) at salary step 6 ($4,121.00/month) and a firefighter (FI) at salary step 6 ($ 3,424.50/month) for the three (3) months between August 16, 1993 through November 16, 1993, amounts to *$2,140.88*.

32. Plaintiff Kenneth Nasadowski was born in Evergreen Park on August 17, 1960, and plaintiff Nasadowski's race is white. Plaintiff Nasadowski, who was hired by the City of Chicago on May 2, 1988, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Nasadowski's cumulative score on fire lieutenant promotional examination #39202 was 95.19, and plaintiff Nasadowski's numerical ranking on fire lieutenant promotion eligible list #39202 was 58. Effective August 16, 1993, the six (6) minority CFD members identified in paragraph 27A, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Nasadowski, were promoted to fire lieutenant, but plaintiff Nasadowski was passed over for promotion. Plaintiff Nasadowski was promoted from firefighter to fire lieutenant effective November 16, 1993. The difference in earnings between a fire lieutenant (F4) at salary step 6 ($4,121.00/month) and a firefighter (F1) at salary step 6 ($3,424.50/month) for the

three (3) months between August 16, 1993 through November 16, 1993, amounts to *$2,140.88*.

33. Plaintiff Brian McMahon was born in Chicago on April 14, 1952, and plaintiff McMahon's race is white. Plaintiff McMahon, who was hired by the City of Chicago on January 2, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff McMahon's cumulative score on fire lieutenant promotional examination #39202 was 95.15, and plaintiff McMahon's numerical ranking on fire lieutenant promotion eligible list #39202 was 60. Effective August 16, 1993, the six (6) minority CFD members identified in paragraph 27A, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff McMahon, were promoted to fire lieutenant, but plaintiff McMahon was passed over for promotion. Plaintiff McMahon was promoted from firefighter to fire lieutenant effective November 16, 1993. The difference in earnings between a fire lieutenant (F4) at salary step 7 ($4,256.50/month) and a firefighter (F1) at salary step 7 ($3,543.50/month) for the three (3) months between August 16, 1993 through November 16, 1993, amounts to *$2,191.64*.

34. Plaintiff Terrance Whirity was born in Chicago on August 18, 1954, and plaintiff Whirity's race is white. Plaintiff Whirity, who was hired by the City of Chicago on June 15, 1976, was assigned to duty as a paramedic with the CFD's Bure au of Emergency Medical Services, and was transferred to the CFD's Bureau of Fire Suppression and Rescue on May 1, 1990 when plaintiff Whirity became a certified firefighter. Plaintiff Whirity's cumulative score on fire lieutenant promotional examination #39202 was 94.87, and plaintiff Whirity's numerical ranking on fire lieutenant promotion eligible list #39202 was 77. Effective November 16, 1993, the 12 minority CFD members identified in paragraph 27B, who had lower numerical rankings on fire

lieutenant promotion eligible list #39202 than did plaintiff Whirity, were promoted to fire lieutenant, but plaintiff Whirity was passed over for promotion. Plaintiff Whirity was promoted from firefighter to fire lieutenant effective November 1, 1994. The difference in earnings between a fire lieutenant (F4) at salary step 8 (rising from $4,391.00/month to $4,566.50/month) and a firefighter (F1) at salary step 8 (rising from $3,668.00/month to $3,814.50/month) for the 11.5 months between November 16, 1993 through October 31, 1994, amounts to *$8,807.13*.

35. Plaintiff Patrick Sweeney was born in Chicago on March 17, 1960, and plaintiff Sweeney's ace is white. Plaintiff Sweeney, who was hired by the City of Chicago on July 16, 1986, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Sweeney's cumulative score on fire lieutenant promotional examination #39202 was 94.87, and plaintiff Sweeney's numerical ranking on fire lieutenant promotion eligible list #39202 was 77. Effective November 16, 1993, the 12 minority CFD members identified in paragraph 27B, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Sweeney, were promoted to fire lieutenant, but plaintiff Sweeney was passed over for promotion. Plaintiff Sweeney was promoted from firefighter to fire lieutenant effective November 1, 1994. The difference in earnings between a fire lieutenant (F4) at salary step 6 (rising from $4,121.00/month to $4,286.00/month) and a firefighter (F1) at salary step 6 (rising from $3,424.50/month to $3,561.50/month) for the 11.5 months between November 16, 1993 through October 31, 1994, amounts to *$8,484.44*.

36. Plaintiff John Fleischhacker was born in Chicago on January 31, 1952, and plaintiff Fleischhacker's race is white. Plaintiff Fleischhacker, who was hired by the City of Chicago on March 1, 1980, was assigned to duty as a firefighter with

the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Fleischhacker's cumulative score on fire lieutenant promotional examination #39202 was 94.80, and plaintiff Fleischhacker's numerical ranking on fire lieutenant promotion eligible list #39202 was 80. Effective November 16, 1993, the 12 minority CFD members identified in paragraph 27B, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Fleischhacker, were promoted to fire lieutenant, but plaintiff Fleischhacker was passed over for promotion. Plaintiff Fleischhacker was promoted from firefighter to fire lieutenant effective November 1, 1994. The difference in earnings between a fire lieutenant (F4) at salary step 7 (rising from $4,256.50/month to $4,427.00/month) and a firefighter (F1) at salary step 7 (rising from $3,543.50/month to $3,685.00/month) for the 11.5 months between November 16, 1993 through October 31, 1994, amounts to *$8,688.39*.

37. Plaintiff Michael Oliver was born in Chicago on March 10, 1958, and plaintiff Oliver's race is white. Plaintiff Oliver, who was hired by the City of Chicago on February 18, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Oliver's cumulative score on fire lieutenant promotional examination #39202 was 94.78, and plaintiff Oliver's numerical ranking on fire lieutenant promotion eligible list #39202 was 81. Effective November 16, 1993, the 12 minority CFD members identified in paragraph 27B, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Oliver, were promoted to fire lieutenant, but plaintiff Oliver was passed over for promotion. Plaintiff Oliver was promoted from fire engineer to fire lieutenant effective November 1, 1994. The difference in earnings between a fire lieutenant (F4) at salary step 7 (rising from $4,256.50/month to $4,427.00/month) and a fire engineer (F3A) at salary step 7 (rising from $3,837.50/month to

$3991.00/month) for the 11.5 months between November 16, 1993 through October 31, 1994, amounts to *$5,105.73*.

38. Plaintiff Robert Anthony was born in Chicago on September 8, 1953, and plaintiff Anthony's race is white. Plaintiff Anthony, who was hired by the City of Chicago on February 16, 1983, was assigned to duty as a paramedic with the CFD's Bureau of Emergency Medical Services, and was transferred to the CFD's Bureau of Fire Suppression and Rescue on February 1, 1987 when plaintiff Anthony became a certified firefighter. Plaintiff Anthony's cumulative score on fire lieutenant promotional examination #39202 was 94.77, and plaintiff Anthony's numerical ranking on fire lieutenant promotion eligible list #39202 was 83. Effective November 16, 1993, the 12 minority CFD members identified in paragraph 27B, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Anthony, were promoted to fire lieutenant, but plaintiff Anthony was passed over for promotion. Plaintiff Anthony was promoted from firefighter to fire lieutenant effective November 1, 1994. The difference in earnings between a fire lieutenant (F4) at salary step 7 (rising from $4,256.50/month to $4,427.00/month) and a cross-trained firefighter/paramedic (F2) at salary step 7 (rising from $3,722.50/month to $3,871.50/month) for the 11.5 months between November 16, 1993 through October 31, 1994, amounts to *$6,505.29*.

39. Plaintiff John Brennan was born in Chicago on March 17, 1960, and plaintiff Brennan's race is white. Plaintiff Brennan, who was hired by the City of Chicago on July 18, 1988, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Brennan's cumulative score on fire lieutenant promotional examination #39202 was 94.73, and plaintiff Brennan's numerical ranking on fire lieutenant promotion eligible list #39202 was 83. Effective November 16, 1993, the 12 minority CFD members identified in paragraph 27B, who had lower numerical

rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Brennan, were promoted to fire lieutenant, but plaintiff Brennan was passed over for promotion. Plaintiff Brennan was promoted from firefighter to fire lieutenant effective November 1, 1994. The difference in earnings between a fire lieutenant (F4) at salary step 6 (rising from $4,121.00/month to $4,286.00/month) and a firefighter (F1) at salary step 6 (rising from $3,424.50/month to $3,561.50/month) for the 11.5 months between November 16, 1993 through October 31, 1994, amounts to *$8,484.44*.

40. Plaintiff Joseph Christensen's race is white. Plaintiff Christensen, who was hired by the City of Chicago on February 1, 1982, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Christensen's cumulative score on fire lieutenant promotional examination #39202 was 94.67, and plaintiff Christensen's numerical ranking on fire lieutenant promotion eligible list #39202 was 87. Effective November 16, 1993, the 12 minority CFD members identified in paragraph 27B, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Christensen, were promoted to fire lieutenant, but plaintiff Christensen was passed over for promotion. Plaintiff Christensen was promoted from firefighter to fire lieutenant effective November 1, 1994. The difference in earnings between a fire lieutenant (F4) at salary step 7 (rising from $4,256.50/month to $4,427.00/month) and a firefighter (FI) at salary step 7 (rising from $3,543.50/month to $3,685.00/month) for the 11.5 months between November 16, 1993 through October 31, 1994, amounts to *$8,688.39*.

41. Plaintiff Wayne Carter was born in Chicago on September 13, 1951, and plaintiff Carter is a Native American. Plaintiff Carter, who was hired by the City of Chicago on March 3, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and

Rescue. Plaintiff Carter's cumulative score on fire lieutenant promotional examination #39202 was 94.63, and plaintiff Carter's numerical ranking on fire lieutenant promotion eligible list #39202 was 89. Effective November 16, 1993, the 12 minority CFD members identified in paragraph 27B, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Carter, were promoted to fire lieutenant, but plaintiff Carter was passed over for promotion. Plaintiff Carter was promoted from firefighter to fire lieutenant effective November 1, 1994. The difference in earnings between a fire lieutenant (F4) at salary step 7 (rising from $4,256.50/month to $4,427.00/month) and a firefighter (FI) at salary step 7 (rising from $3,543.50/month to $3,685.00/month) for the 11.5 months between November 16, 1993 through October 31, 1994, amounts to *$8,688.39*.

42. Plaintiff Thomas Welch was born in Chicago on August 26, 1952, and plaintiff Welch's race is white. Plaintiff Welch, who was hired by the City of Chicago on November 16, 1978, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Welch's cumulative score on fire lieutenant promotional examination #39202 was 94.59, and plaintiff Welch's numerical ranking on fire lieutenant promotion eligible list #39202 was 91. Effective November 1, 1994, the seven (7) minority CFD members identified in paragraph 27C, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Welch, were promoted to fire lieutenant, but plaintiff Welch was passed over for promotion. Plaintiff Welch was promoted from fire engineer to fire lieutenant effective August 1, 1995. The difference in earnings between a fire lieutenant (F4) at salary step 8 (rising from $4,566.50/month to $4,658.00/month) and a fire engineer (F3A) at salary step 8 (rising from $4,128.50/month to $4,210.00/month) for the nine (9) months between November 1, 1994 through July 31, 1995, amounts to *$4,013.00*.

43. Plaintiff Richard Drezek was born in Poland on March 5, 1954, and plaintiff Drezek's race is white. Plaintiff Drezek, who was hired by the City of Chicago on May 2, 1988, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Drezek's cumulative score on fire lieutenant promotional examination #39202 was 94.50, and plaintiff Drezek's numerical ranking on fire lieutenant promotion eligible list #39202 was 92. Effective November 1, 1994, the seven (7) minority CFD members identified in paragraph 27C, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Drezek, were promoted to fire lieutenant, but plaintiff Drezek was passed over for promotion. Plaintiff Drezek was promoted from firefighter to fire lieutenant effective August 1, 1995. The difference in earnings between a fire lieutenant (F4) at salary step 6 (rising from $4,286.00/month to $4,371.50/month) and a firefighter (F1) at salary step 6 (rising from $3,561.50/month to $3,632.50/month) for the nine (9) months between November 1, 1994 through July 3 amounts to *$6,622.00*.

44. Plaintiff Guy McAndrew was born in Chicago on March 28, 1958, and plaintiff McAndrew's race is white. Plaintiff McAndrew, who was hired by the City of Chicago on January 2, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff McAndrew's cumulative score on fire lieutenant promotional examination #39202 was 94.46, and plaintiff McAndrew's numerical ranking on fire lieutenant promotion eligible fist #39202 was 92. Effective November 1, 1994, the seven (7) minority CFD members identified in paragraph 27C, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff McAndrew, were promoted to fire lieutenant, but plaintiff McAndrew was passed over for promotion. Plaintiff McAndrew was promoted from fire engineer to fire lieutenant effective

August 1, 1995. The difference in earnings between a fire lieutenant (F4) at salary step 7 (rising from $4,427.00/month to $4,515.50/month) and salary step 8 ($4,658.00/month) and a firefighter (FI) at salary step 7 (rising from $3,685.00/month to $3,758.50/month) and a fire engineer (F3A) at salary step 8 ($4,210.50/month) for the nine (9) months between November 1, 1994 through July 31, 1995, amounts to *$4,771.25*.

45. Plaintiff Daniel DeGryse's race is white. Plaintiff DeGryse, who was hired by the City of Chicago on November 1, 1989, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff DeGryse's cumulative score on fire lieutenant promotional examination #39202 was 94.42, and plaintiff DeGryse's numerical ranking on fire lieutenant promotion eligible list #39202 was 94. Effective November 1, 1994, the seven (7) minority CFD members identified in paragraph 27C, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff DeGryse, were promoted to fire lieutenant, but plaintiff DeGryse was passed over for promotion. Plaintiff DeGryse was promoted from firefighter to fire lieutenant effective August 1, 1995. The difference in earnings between a fire lieutenant (F4) at salary step 6 (rising from $4,286.00/month to $4,371.50/month) and a firefighter (F1) at salary step 6 (rising from $3,561.50/month to $3,362.50/month) for the nine (9) months between November 1, 1994 through July 31, 1995, amounts to *$6,622.00*.

46. Plaintiff Daniel Leland was born in Chicago on June 30, 1963, and plaintiff Leland's race is white. Plaintiff Leland, who was hired by the City of Chicago in November 1, 1986, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Leland's cumulative score on fire lieutenant promotional examination #39202 was 94.42, and plaintiff Leland's

numerical ranking on fire lieutenant promotion eligible list #39202 was 94. Effective November 1, 1994, the seven (7) *minority CFD members identified in paragraph 27C,* who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Leland, were promoted to fire lieutenant, but plaintiff Leland was passed over for promotion. Plaintiff Leland was promoted from fire engineer to fire lieutenant effective August 1, 1995. The difference in earnings between a fire lieutenant (F4) at salary step 6 (rising from $4,286.00/month to $4,371.50/month) and a firefighter (FI) at salary step 6 ($3,561.50/month) and a fire engineer (F3A) at salary step 6 ($3,935.50/month) for the nine (9) months between November 1, 1994 through July 31, 1995, amounts to *$4,352.50.*

47. Plaintiff Richard Temple was born in Chicago on June 20, 1962, and plaintiff Temple's race is white. Plaintiff Temple, who was hired by the City of Chicago on February 17, 1987, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Temple's cumulative score on fire lieutenant promotional examination #39202 was 94.35, and plaintiff Temple's numerical ranking on fire lieutenant promotion eligible list #39202 was 97. Effective November 1, 1994, the seven (7) minority CFD members identified in paragraph 27C, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Temple, were promoted to fire lieutenant, but plaintiff Temple was passed over for promotion. Plaintiff Temple was promoted from firefighter to fire lieutenant effective August 1, 1995. The difference in earnings between a fire lieutenant (F4) at salary step 6 (rising from $4,286.00/month to $4,371.50/month) and a firefighter (F1) at salary step 6 (rising from $3,561.50/month to $3,632.50/month) for the nine (9) months between November 1, 1994 through July 31, 1995, amounts to *$6,622.00.*

48. Plaintiff Richard Gustafson was born on August 7, 1953, and plaintiff Gustafson's race is white. Plaintiff Gustafson, who was hired by the City of Chicago on February 1, 1982, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Gustafson's cumulative score on fire lieutenant promotional examination #39202 was 94.15, and plaintiff Gustafson's numerical ranking on fire lieutenant promotion eligible list #39202 was 113. Effective August 1, 1995, the 12 minority CFD members identified in paragraph 27D, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Gustafson, were promoted to fire lieutenant, but plaintiff Gustafson was passed over for promotion. Plaintiff Gustafson was promoted from fire engineer to fire lieutenant effective January 1, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 7 ($4,515.50/month) and a fire engineer (F3A) at salary step 7 ($4,071.00/month) for the five (5) months between August 1, 1995 through December 31, 1995, amounts to *$2,222.50*.

49. Plaintiff Ralph McMullen's race is white. Plaintiff McMullen, who was hired by the City of Chicago on July 16, 1986, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff McMullen's cumulative score on fire lieutenant promotional examination #39202 was 94.15, and plaintiff McMullen's numerical ranking on fire lieutenant promotion eligible list #39202 was 113. Effective August 1, 1995, the 12 minority CFD members identified in paragraph 27D, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff McMullen, were promoted to fire lieutenant, but plaintiff McMullen was passed over for promotion. Plaintiff McMullen was promoted from firefighter to fire lieutenant effective January 1, 1996. The difference in earnings between a fire lieutenant (F4) at salary

step 6 ($4,371.50/month) and a firefighter (F1) at salary step 6 ($3,632.50/month) for the five (5) months between August 1, 1995 through December 31, 1995, amounts to *$3,695.00*.

50. Plaintiff Martin F. Gaughan's race is white. Plaintiff Gaughan, who was hired by the City of Chicago on November 1, 1986, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Gaughan's cumulative score on fire lieutenant promotional examination #39202 was 94.15, and plaintiff Gaughan's numerical ranking on fire lieutenant promotion eligible list #39202 was 113. Effective August 1, 1995, the 12 minority CFD members identified in paragraph 27D, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Gaughan, were promoted to fire lieutenant, but plaintiff Gaughan was passed over for promotion. Plaintiff Gaughan was promoted from firefighter to fire lieutenant effective January 1, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 6 ($4,371.50/month) and a firefighter (FI) at salary step 6 ($3,632.50/month) for the five (5) months between August 1, 1995 through December 31, 1995, amounts to *$3,695.00*.

51. Plaintiff Mark Owsianiak was born in Chicago on May 26, 1962, and plaintiff Owsianiak's race is white. Plaintiff Owsianiak, who was hired by the City of Chicago on December 3, 1990, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Owsianiak's cumulative score on fire lieutenant promotional examination #39202 was 94.11, and plaintiff Owsianiak's numerical ranking on fire lieutenant promotion eligible list #39202 was 116. Effective August 1, 1995, the 12 minority CFD members identified in paragraph 27D, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Owsianiak, were promoted to fire lieutenant, but plaintiff Owsianiak was passed over for promotion. Plaintiff Owsianiak was promoted from fire-

fighter to fire lieutenant effective January 1, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 6 ($4,371.50/month) and a firefighter (FI) at salary step 6 ($3,632.50/month) for the five (5) months between August 1, 1995 through December 31, 1995, amounts to *$3,695.00*.

52. Plaintiff Edward Doherty's race is white. Plaintiff Doherty, who was hired by the City of Chicago on December 1, 1988, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Doherty's cumulative score on fire lieutenant promotional examination #39202 was 94.08, and plaintiff Doherty's numerical ranking on fire lieutenant promotion eligible list #39202 was 118. Effective August 1, 1995, the 12 minority CFD members identified in paragraph 27D, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Doherty, were promoted to fire lieutenant, but plaintiff Doherty was passed over for promotion. Plaintiff Doherty was promoted from firefighter to fire lieutenant effective January 1, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 6 ($4,371.50/month) and a firefighter (F1) at salary step 6 ($3,632.50/month) for the five (5) months between August l, 1995 through December 31, 1995, amounts to *$3,695.00*.

53. Plaintiff John F. Kelly's race is white. Plaintiff Kelly, who was hired by the City of Chicago on February 18, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Kelly's cumulative score on fire lieutenant promotional examination #39202 was 94.06, and plaintiff Kelly's numerical ranking on fire lieutenant promotion eligible list #39202 was 119. Effective August 1, 1995, the 12 minority CFD members identified in paragraph 27D, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Kelly, were promoted to fire lieutenant, but plaintiff Kelly was passed over for promotion. Plaintiff Kelly was promoted

from fire engineer to fire lieutenant effective January 1, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 8 ($4,658. 00/month) and a fire engineer (F3A) at salary step 8 ($4,210.50/month) for the five (5) months between August 1, 1995 through December 31, 1995, amounts to *$2,237.50*.

54. Plaintiff Robert Pillon, Jr. was born in Chicago on September 22, 1956, and plaintiff Pillon's race is white. Plaintiff Pillon, who was hired by the City of Chicago on February 1, 1983, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Pillon's cumulative score on fire lieutenant promotional examination #39202 was 94.06, and plaintiff Pillon's numerical ranking on fire lieutenant promotion eligible list #39202 was 119. Effective August 1, 1995, the 12 minority CFD members identified in paragraph 27D, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Pillon, were promoted to fire lieutenant, but plaintiff Pillon was passed over for promotion. Plaintiff Pillon was promoted from firefighter to fire lieutenant effective January 1, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 7 ($4,371.50/month) and a firefighter (Fl) at salary step 7($3,632.50/month) for the five (5) months between August 1, 1995 through December 31, 1995, amounts to *$3,785.00*.

55. Plaintiff Edward Carone was born in Chicago on December 12, 1943, and plaintiff Carone's race is white. Plaintiff Carone, who was hired by the City of Chicago on August 16, 1967, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Carone's cumulative score on fire lieutenant promotional examination #39202 was 94.04, and plaintiff Carone's numerical ranking on fire lieutenant promotion eligible list #39202 was 121. Effective August 1, 1995, the 12 minority

CFD members identified in paragraph 27D, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Carone, were promoted to fire lieutenant, but plaintiff Carone was passed over for promotion. Plaintiff Carone was promoted from firefighter to fire lieutenant effective January 1, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 10 ($4,962.50/month) and a firefighter (F1) at salary step 10 ($4,175.50/month) for the five (5) months between August 1, 1995 through December 31, 1995, amounts to *$3,935.00.*

56. Plaintiff James Hannon's race is white. Plaintiff Hannon, who was hired by the City of Chicago on February 20, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Hannon's cumulative score on fire lieutenant promotional examination #39202 was 94.00, and plaintiff Hannon's numerical ranking on fire lieutenant promotion eligible list #39202 was 123. Effective August 1, 1995, the 12 minority CFD members identified in paragraph 27D, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Hannon, were promoted to fire lieutenant, but plaintiff Hannon was passed over for promotion. Plaintiff Hannon was promoted from firefighter to fire lieutenant effective January 1, 1996. The difference in earnings between afire lieutenant (F4) at salary step 8 ($4,658.00/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) for the five (5) months between August 1, 1995 through December 31, 1995, amounts to *$3,835.00.*

57. Plaintiff James Byrne's race is white. Plaintiff Byrne, who was hired by the City of Chicago on November 11, 1988, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Byrne's cumulative score on fire lieutenant promotional examination #39202 was 93.99, and plaintiff Byrne's numerical ranking on fire lieutenant promotion eligible list #39202 was 124.

Effective August 1, 1995, the 12 minority CFD members identified in paragraph 27D, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Byrne, were promoted to fire lieutenant, but plaintiff Byrne was passed over for promotion. Plaintiff Byrne was promoted from firefighter to fire lieutenant effective January 1, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 6 ($4,371.50/month) and a firefighter (F1) at salary step 6 ($3,632.50/month) for the five (5) months between August 1, 1995 through December 31, 1995, amounts to *$3,695.00*.

58. Plaintiff James Clarke was born in Chicago on June 4, 1955, and plaintiff Clarke's race is white. Plaintiff Clarke, who was hired by the City of Chicago on February 20, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Clarke's cumulative score on fire lieutenant promotional examination #39202 was 93.99, and plaintiff Clarke's numerical ranking on fire lieutenant promotion eligible list #39202 was 124. Effective August 1, 1995, the 12 minority CFD members identified in paragraph 27D, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Clarke, were promoted to fire lieutenant, but plaintiff Clarke was passed over for promotion. Plaintiff Clarke was promoted from fire engineer to fire lieutenant effective January 1, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 8 ($4,658.00/month) and a fire engineer (F3A) at salary step 8 ($4,210.50/month) for the five (5) months between August 1, 1995 through December 31, 1995, amounts to *$2,237.50*.

59. Plaintiff Tom Gustafson's race is white. Plaintiff Gustafson, who was hired by the City of Chicago on January 2, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Gustafson's cumulative score on fire lieutenant promotional examination

#39202 was 93.98, and plaintiff Gustafson's numerical ranking on fire lieutenant promotion eligible list #39202 was 126. Effective August 1, 1995, the 12 minority CFD members identified in paragraph 27D, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Gustafson, were promoted to fire lieutenant, but plaintiff Gustafson was passed over for promotion. Plaintiff Gustafson was promoted from firefighter to fire lieutenant effective January 1, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 8 ($4,658.00/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) for the five (5) months between August 1, 1995 through December 31, 1995, amounts to *$3,835.00*.

60. Plaintiff John McErlean was born in Chicago on February 27, 1957, and plaintiff McErlean's race is white. Plaintiff McErlean, who was hired by the City of Chicago on February 16, 1985, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff McErlean's cumulative score on fire lieutenant promotional examination #39202 was 93.62, and plaintiff McErlean's numerical ranking on fire lieutenant promotion eligible fist #39202 was 147. Effective January 1, 1996, the 10 minority CFD members identified in paragraph 27E, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff McErlean, were promoted to fire lieutenant. Plaintiff McErlean was promoted from firefighter to fire lieutenant effective May 16, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 7 ($4,550.50/month) and a firefighter (Fl) at salary step 7 ($3,758.50/month) for the 4.5 months between January 1, 1996 to May 15, 1996, amounts to *$3,406.50*.

61. Plaintiff Michael Norris was born in Evergreen Park, Illinois on January 26, 1955, and plaintiff Norris's race is white. Plaintiff Norris, who was hired by the City of Chicago on January 2, 1980, was assigned to duty as a firefighter with

the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Norris's cumulative score on fire lieutenant promotional examination #39202 was 93.59, and plaintiff Norris's numerical ranking on fire lieutenant promotion eligible list #39202 was 148. Effective January 1, 1996, the 10 minority CFD members identified in paragraph 27E, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Norris, were promoted to fire lieutenant, but plaintiff Norris was passed over for promotion. Plaintiff Norris was promoted from firefighter to fire lieutenant effective May 16, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 8 ($4,658.00/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) for the 4.5 months between January 1, 1996 through May 15, 1996, amounts to *$3,451.50*.

62. Plaintiff Jeffrey Heinz was born in Chicago on September 21, 1959, and plaintiff Heinz's race is white. Plaintiff Heinz, who was hired by the City of Chicago on July 16, 1986, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Heinz's cumulative score on fire lieutenant promotional examination #39202 was 93.57, and plaintiff Heinz's numerical ranking on fire lieutenant promotion eligible list #39202 was 149. Effective January 1, 1996, the 10 minority CFD members identified in paragraph 27E, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Heinz, were promoted to fire lieutenant, but plaintiff Heinz was passed over for promotion. Plaintiff Heinz was promoted from firefighter to fire lieutenant effective May 16, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 6 ($4,371.50/month) and a firefighter (Fl) at salary step 6 ($3,632.50/month) for the 4.5 months between January 1, 1996 through May 15, 1996, amounts to *$3,325.50*.

63. Plaintiff Gerald Hamburg was born on November 18, 1959, and plaintiff Hamburg's race is white. Plaintiff Hamburg, who was hired by the City of Chicago on February 20, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Hamburg's cumulative score on fire lieutenant promotional examination #39202 was 93.56, and plaintiff Hamburg's numerical ranking on fire lieutenant promotion eligible list #39202 was 150. Effective January 1, 1996, the 10 minority CFD members identified in paragraph 27E, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Hamburg, were promoted to fire lieutenant, but plaintiff Hamburg was passed over for promotion Plaintiff Hamburg was promoted from firefighter to fire lieutenant effective May 16, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 8 ($4,658.00/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) for the 4.5 months between January 1, 1996 through May 15, 1996, amounts to *$3,451.50*.

64. Plaintiff Warren Stahmer was born on April 25, 1963, and plaintiff Stahmer's race is white. Plaintiff Stahmer, who was hired by the City of Chicago on February 20, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Stahmer's cumulative score on fire lieutenant promotional examination #39202 was 93.56, and plaintiff Stahmer's numerical ranking on fire lieutenant promotion eligible list #39202 was 150. Effective January 1, 1996, the 10 minority CFD members identified in paragraph 27E, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Stahmer, were promoted to fire lieutenant, but plaintiff Stahmer was passed over for promotion. Plaintiff Stahmer was promoted from firefighter to fire lieutenant effective May 16, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 7 ($4,515.50/month) and a firefighter (F1)

at salary step 7 ($3,758.50/month) for the 4.5 months between January 1, 1996 through May 15, 1996, amounts to *$3,406.50*.

65. Plaintiff Kevin Kennelly was born in Chicago on May 20, 1955, and plaintiff Kennelly's race is white. Plaintiff Kennelly, who was hired by the City of Chicago on February 20, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Kennelly's cumulative score on fire lieutenant promotional examination #39202 was 93.56, and plaintiff Kennelly's numerical ranking on fire lieutenant promotion eligible list #39202 was 150. Effective January 1, 1996, the 10 minority CFD members identified in paragraph 27E, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Kennelly, were promoted to fire lieutenant, but plaintiff Kennelly was passed over for promotion. Plaintiff Kennelly was promoted from firefighter to fire lieutenant effective May 16, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 8 ($4,658.00/month) and a firefighter (FI) at salary step 8 ($3,891.00/month) for the 4.5 months between January 1, 1996 through May 15, 1996, amounts to *$3,451.50*.

66. Plaintiff Stan Pavilonis was born in Chicago on June 15, 1958, and plaintiff Pavilonis's race is white. Plaintiff Pavilonis, who was hired by the City of Chicago on February 19, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Pavilonis's cumulative score on fire lieutenant promotional examination #39202 was 93.50, and plaintiff Pavilonis's numerical ranking on fire lieutenant promotion eligible list #39202 was 154. Effective January 1, 1996, the 10 minority CFD members identified in paragraph 27E, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Pavilonis, were promoted to fire lieutenant, but plaintiff Pavilonis was passed over for promotion. Plaintiff Pavilonis was promoted from fire

engineer to fire lieutenant effective May 16, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 8 ($4,658.00/ month) and a fire engineer (F3A) at salary step 8 ($4,210.50/month) for the 4.5 months between January 1, 1996 through May 15, 1996, amounts to *$2013.75*.

67. Plaintiff Robert Gallapo was born on December 19, 1956, and plaintiff Gallapo's race is white. Plaintiff Gallapo, who was hired by the City of Chicago on October 10, 1978, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Gallapo's cumulative score on fire lieutenant promotional examination #39202 was 93.45, and plaintiff Gallapo's numerical ranking on fire lieutenant promotion eligible list #39202 was 155. Effective January 1, 1996, the 10 minority CFD members identified in paragraph 27E, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Gallapo, were promoted to fire lieutenant, but plaintiff Gallapo was passed over for promotion. Plaintiff Gallapo was promoted from firefighter to fire lieutenant effective May 16, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 8 ($4,658.00/month) and a firefighter (FI) at salary step 8 ($3,89 1.001month) for the 4.5 months between January 1, 1996 through May 15, amounts to *$3,451.50*.

68. Plaintiff Glen Lyman was born in Evergreen Park, Illinois on April 8, 1962, and plaintiff Lyman's race is white. Plaintiff Lyman, who was hired by the City of Chicago on April 1, 1982, was assigned to duty as a paramedic with the CFD's Bureau of Emergency Medical Services, and was transferred to the CFD's Bureau of Fire Suppression and Rescue when plaintiff Lyman became a certified firefighter. Plaintiff Lyman's cumulative score on fire lieutenant promotional examination #39202 was 93.43, and plaintiff Lyman's numerical ranking on fire lieutenant promotion eligible list #39202 was 156. Effective January 1, 1996, the

10 minority CFD members identified in paragraph 27E, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Lyman, were promoted to fire lieutenant, but plaintiff Lyman was passed over for promotion. Plaintiff Lyman was promoted from firefighter to fire lieutenant effective May 16, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 7 ($4,515.50/month) and a cross-trained firefighter/paramedic (F2) at salary step 7 ($3,946.00/month) for the 4.5 months between January 1, 1996 through May 15, 1996, amounts to *$2,562.75*.

69. Plaintiff Robert Griffin was born in Chicago on July 18, 1956, and plaintiff Griffin's race is white. Plaintiff Griffin, who was hired by the City of Chicago on February 14, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Griffin's cumulative score on fire lieutenant promotional examination #39202 was 93.12, and plaintiff Griffin's numerical ranking on fire lieutenant promotion eligible list #39202 was 173. Effective May 16, 1996, the two (2) minority CFD members identified in paragraph 27F, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Griffin, were promoted to fire lieutenant, but plaintiff Griffin was passed over for promotion. Plaintiff Griffin was promoted from fire engineer to fire lieutenant effective July 1, 1996. The difference in earnings between a fire lieutenant (F4) at salary step 8 ($4,658.00/month) and a fire engineer (F3A) at salary step 8 ($4210.50/month) for the 1.5 months between May 16, 1996 through July 1, 1996, amounts to *$671.25*.

70. Plaintiff Nicholas Infante was born in Chicago on January 17, 1955, and plaintiff Infante's race is white. Plaintiff Infante, who was hired by the City of Chicago on February 19, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff

Infante's cumulative score on fire lieutenant promotional examination #39202 was 93.07, and plaintiff Infante's numerical ranking on fire lieutenant promotion eligible list #39202 was 180. Effective July 1, 1996, the four (4) minority CFD members identified in paragraph 27G, who had lower scores and lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Infante, were promoted to fire lieutenant, but plaintiff Infante was passed over for promotion. Plaintiff Infante was promoted to fire lieutenant effective January 1, 1997. The difference in earnings between a fire lieutenant (F4) at salary step 8 ($4,658.00/month) and a firefighter (Fl) at salary step 8 ($3891.00/month) for the six (6) months between July 1, 1996 through December 3l, 1996, amounts to *$4,602.00*.

71. Plaintiff Daniel O'Connell was born in Chicago on January 13, 1955, and plaintiff O'Connell's race is white. Plaintiff O'Connell, who was hired by the City of Chicago on March 1, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff O'Connell's cumulative score on fire lieutenant promotional examination #39202 was 93.05, and plaintiff O'Connell's numerical ranking on fire lieutenant promotion eligible list #39202 was 182. Effective July 1, 1996, the four (4) minority CFD members identified in paragraph 27G, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff O'Connell, were promoted to fire lieutenant, but plaintiff O'Connell was passed over for promotion. Plaintiff O'Connell was promoted to fire lieutenant effective January 1, 1997. The difference in earnings between a fire lieutenant (F4) at salary step 8 ($4,658.00/month) and a fire engineer (F3A) at salary step 8 ($4,210.50/month) for the six (6) months between July 1, 1996 through December 31, 1996, amounts to *$2,685.00*.

72. Plaintiff Keith Bozenda was born in Chicago on October 2, 1957, and plaintiff Bozenda's race is white.

Plaintiff Bozenda, who was hired by the City of Chicago on February 20, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Bozenda's cumulative score on fire lieutenant promotional examination #39202 was 92.98, and plaintiff Bozenda's numerical ranking on fire lieutenant promotion eligible list #39202 was 183. Effective July 1, 1996, the four (4) minority CFD members identified in paragraph 27G, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Bozenda, were promoted to fire lieutenant, but plaintiff Bozenda was passed over for promotion. Plaintiff Bozenda was promoted to fire lieutenant effective January 1, 1997. The difference in earnings between a fire lieutenant (F4) at salary step 8 ($4,658.00/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) for the six (6) months between July 1, 1996 through December 31, 1996, amounts to *$4,602.00*.

73. Plaintiff John F. McDonaugh was born in Chicago on December 24, 1957, and plaintiff McDonaugh's race is white. Plaintiff McDonaugh, who was hired by the City of Chicago on February 19, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff McDonaugh's cumulative score on fire lieutenant promotional examination #39202 was 92.54, and plaintiff McDonaugh's numerical ranking on fire lieutenant promotion eligible list #39202 was 208. Effective January 1, 1997, the two (2) minority CFD members identified in paragraph 27H, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff McDonaugh, were promoted to fire lieutenant, but plaintiff McDonaugh was passed over for promotion. Plaintiff McDonaugh was promoted to fire lieutenant effective March 1, 1997. The difference in earnings between a fire lieutenant (F4) at salary step 8 ($4,658.00/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) for the two (2) months between January 1, 1997 through February 28, 1997, amounts to *$1,534.00*.

74. Plaintiff James Soludczyk was born in Chicago on May 8, 1964, and plaintiff Soludczyk's race is white. Plaintiff Soludczyk, who was hired by the City of Chicago on November 1, 1989, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Soludczyk's cumulative score on fire lieutenant promotional examination #39202 was 92.54, and plaintiff Soludczyk's numerical ranking on fire lieutenant promotion eligible list #39202 was 208. Effective January 1, 1997, the two (2) minority CFD members identified in paragraph 27H, who had lower numerical rankings on fire lieutenant promotion eligible list #39202 than did plaintiff Soludczyk, were promoted to fire lieutenant, but plaintiff Soludczyk was passed over for promotion. Plaintiff Soludczyk was promoted to fire lieutenant effective March 1, 1997. The difference in earnings between a fire lieutenant (F4) at salary step 6 ($4,371.00/month) and a firefighter (F1) at salary step 8 ($3,632.00/month) for the two (2) months between January 1, 1997 through February 28, 1997, amounts to *$1,478.00*.

75. Each of the 45 plaintiffs identified in paragraphs 31 through 75, inclusive, would have been promoted to fire lieutenant off of fire lieutenant promotional eligible list #39202 on the dates specified except that the promotions that these plaintiffs would otherwise have received were awarded to minority members of the CFD and claimed by the City to be justified as affirmative action promotions.

STIPULATIONS OF UNCONTESTED FACTS IN CASE NUMBER 96 C 0808

The specific uncontested facts relating to this case are as follows:

1994 Fire Engineer Examination #39305

1. The 1994 fire engineer promotional examination #39305 was announced on September 16, 1993. Applications for fire engineer promotional examination #39305 were taken between September 24, 1993 and September 30, 1993. All

firefighters with one year's seniority and a driver's license issued on or after April 1, 1990 with a classification of B or a driver's license issued prior to April 1, 1990 with a classification of C or D were eligible to take the examination.

2. The City retained HRStrategies, Inc., a management consulting firm, to develop fire engineer promotional examination #39305. The City also retained the public accounting firm of Arthur Andersen & Co. to administer the test and to secure the test documents. Fire engineer promotional examination #39305 consisted of three parts, a written multiple choice test, a pump simulator test and credit for seniority.

3. After gathering background information about the CFD and prior testing procedures, HRStrategies, Inc. did a job analysis of the position of fire engineer. This process began by having subject matter experts (incumbent fire engineers) determine the tasks and duties of the job. The engineers then evaluated the tasks in terms of their importance to the job. Important tasks were then grouped into dimensions or categories. Next, higher-ranking subject matter experts (incumbent fire lieutenants and fire captains) determined the knowledge, skills and abilities ("KSA's") required to perform the job of fire engineer. These KSA's, after being evaluated in terms of importance, were used to develop specific items for the test, thus ensuring the content validity of the selection device.

4. The four task categories or dimensions and their weights based on their relative importance to the job were Incident Response (46%), Morning Equipment Checkout (29%), Apparatus Maintenance, Equipment Tests and Training Exercises (19%) and Maintenance of Physical Plant (6%). The goal of HRStrategies, Inc. was to develop a test that would be related to these job categories and the KSA's linked to the specific tasks within each job category.

5. The process described above is detailed in the June, 1994 "Technical Report on the Development of a Promotional Examination for Chicago Fire Department Engineer," which was prepared by HRStrategies, Inc.

6. The test applicants were given a training bulletin that provided essential information for the examination. They also were sent a handout describing each component of the test and suggestions on how to study and prepare for those test components.

7. HRStrategies, Inc. worked with two high-ranking CFD officers and the chief engineer to develop the pump simulator test, the first component of fire engineer promotional examination #39305. The purpose of that test was to try to simulate supplying a pressurized stream of water at a fire scene, one of the essential duties of a fire engineer.

8. Prior to the administration of fire engineer promotional examination #39305, the CFD offered training in pump operations to all candidates who wanted such training. Once the candidates arrived at the test size, they were given a brief written overview of the pump simulation and watched a short video about the pump simulators.

9. An engineer within the CFD's Bureau of Fire Suppression and Rescue is responsible for the operation and basic maintenance of the engine and pump apparatus. Because the safety and effectiveness of other fire fighting personnel is largely dependent upon the skill of the engineer to provide water at the appropriate time and pressure through the proper lines, the quality of candidates promoted to fire engineer is critical for the effective operation of the CFD.

10. During the year 1993, the number of uniformed members of the CFD holding the rank of firefighter was 2,959, among whom 68.9% (2041) were white, 23.4% (693) were black, and 7.6% (225) were Hispanic.

11. Eight-hundred and one (801) candidates were scheduled to take the pump simulator component of fire engineer promotional examination #39305. However, 251 of those candidates did not take the pump simulator component. Of the 550 candidates who took the pump simulator component, four (4) (.7%) were Asian-American, three (3) (.5%) were American Indian, 163 (29%) were black 43 (7.8%) were Hispanic, and 337 (61.3%) were white.

12. The candidates were allowed to choose whether they would use a Waterous or a Hale simulator.

13. The pump simulator component of fire engineer promotional examination #39305 consisted of four (4) fireground problems. The mean score of blacks on the first problem was statistically significantly lower than the mean score of whites and Hispanics. The mean scores of blacks and Hispanics on the last three (3) problems were statistically significantly lower than the mean score of whites.

14. To determine the score on the pump simulator component of fire engineer promotional examination #39305, each of the four (4) problems was standardized to place all four (4) scores on a common scale and to give each pump simulator problem the same weight. The four (4) scores were then added together to create a final pump simulator score, which was then standardized so that it could be combined with the other test components. These standardization processes were not based on race.

15. The written multiple choice component of fire engineer promotional examination #39305 consisted of two (2) parts. One part was a Closed Book test to assess a candidate's knowledge of CFD equipment, CFD general orders, the CFD engineer's manual and other CFD documents. Four (4) fire lieutenants served as subject matter experts in the development of the Closed Book test. The second part was a Video test. The primary purpose of the

Video test was to determine whether candidates were familiar with basic tools and equipment, could identify the purpose of various dials and gauges on pump panels and could read gauges and interpret their meaning. Candidates would have a brief question read to them with a video accompaniment, and then four (4) alternative answers would be presented on a screen from which the candidate had to choose the correct response. Two (2) high-ranking CFD officers participated in the development of the Video test.

16. The written component of fire engineer promotional examination #39305 was administered on November 22, 1993 to 553 candidates. Of the 553 candidates who took the written component, 533 had taken the pump simulator component and 20 had not. Seventeen (17) candidates who had taken the pump simulator component did not take the written component. Of the 553 who took the written component, four (4) (.7%) were Asian American, three (3) (.5%) were American Indian, 167 (30.2%) were black, 42 (7.2%) were Hispanic and 337 (61%) were white.

17. The mean score of blacks was statistically significantly lower on the Closed Book part of the written component of fire engineer promotional examination #39305 than the mean score of whites and Hispanics. The mean scores of blacks and Hispanics on the Video part of the written component of the examination were statistically significantly lower than the mean score of whites.

18. Seniority was credited at a rate of one (1) point for each month of service with the CFD, up to five (5) years of service. The seniority score was standardized so that it could be added to the other examination components. This standardization was not based on race.

19. For seniority, there was no statistically significant difference among racial groups.

20. The results of fire engineer promotional examination #39305 were weighted as follows: 60% written (30% Closed Book, 30% Video), 30% pump simulator and 10% seniority.

21. The means and standard deviations of the overall test results showed no statistically significant differences among racial groups.

22. The City adopted a banding approach, slightly modified from the one HRStrategies, Inc. recommended, in making promotions based on the results of fire engineer promotional examination #39305.

23. On November 17, 1994, an eligible list was created containing in rank order the scores of the 345 candidates who received a passing score of 70 on fire engineer promotional examination #39305.

24. During the year 1993, the number of uniformed members of the CFD holding the rank of fire engineer was 508, among whom 82.4% (419) were white, 13.9% (70) were black, and 3.5% (18) were Hispanic.

25. In a December 1, 1994 letter, Commissioner of Personnel Glenn E. Carr recommended to then Fire Commissioner Raymond E. Orozco that promotions from fire engineer promotional examination #39202 be made on an affirmative action basis. Commissioner Carr proposed that promotions be made at a ratio of 20% over the black and Hispanic composition of the rank (firefighter) eligible for promotion to fire engineer.

26. The City of Chicago developed an eligibility list for fire engineer promotional examination #39305, listing in rank order, by cumulative score, the 345 firefighters who attained passing scores of 70 or above on fire engineer promotional examination #39305, and 65 blacks and 25 Hispanics passed fire engineer promotional examination #39305.

27. Between December 16, 1994 and January 1, 1997, there were nine (9) personnel orders issued by the CFD, making 151 promotions to fire engineer from fire engineer promotional eligibility list #39305. Of these 151 promotions to fire engineer from fire engineer promotional eligibility list #39305, 53 were made on a non-rank order basis and claimed by the City to be justified for reasons articulated in the December 1, 1994 letter from Commissioner Carr to Commissioner Orozco. Of these 53 affirmative action, non-rank order promotions, 41 promotions went to blacks and 12 to Hispanics, to wit:

A. Personnel Order 94-021(eff. 12/16/ 94)

NAME	RACE	SCORE	RANK	DOH
B. Mitchell	Black	94.03	22	08/03/87
L. Terry	"	92.69	32	02/17/87
S. Johnson	"	92.23	35	02/17/87
P. Torrence	"	89.52	59	07/16/86

B. Personnel Order 95-003 (eff. 1/16/95)

NAME	RACE	SCORE	RANK	DOH
D. Walker	Black	87.21	76	12/01/88
E. Brewer	"	87.19	77	07/16/86
R. Love	"	85.84	94	11/01/86
C. Gilmore	"	85.58	98	05/02/88
S. Smith	"	85.34	102	11/01/86
L. Davis	"	85.24	105	02/20/80
D. Ruano	Hisp.	83.97	122	12/01/88

C. Personnel Order 95-007 (eff. 2/16/95)

NAME	RACE	SCORE	RANK	DOH
L. Merrell	Black	85.06	109	02/04/82
O. Johnson	"	84.36	116	07/16/86
R. Eans	"	84.32	117	12/01/88
A. Nunez	Hisp.	83.79	124	07/16/86

R. Jackson	Black	83.67	126	07/16/86
G. Marshall	"	83.41	127	05/02/88
E. Hicks	"	82.76	135	02/17/87
R. Martinez	Hisp.	81.35	158	02/16/85

D. Personnel Order 95-016 (eff. 8/1/95)

NAME	RACE	SCORE	RANK	DOH
E. Griffin	Black	81.42	157	05/02/88
L. Harris	"	81.27	159	02/19/80
B. Dunagan	"	80.55	166	05/01/90
E. Velez	Hisp.	80.53	168	01/02/80

E. Personnel Order 95-025 (eff. 1/1/96)

NAME	RACE	SCORE	RANK	DOH
C. DeJesus	Hisp.	81.52	156	11/01/86
W. Epps	Black	79.72	183	05/02/88
G. Powell	"	79.62	188	09/04/79
M. Brandon	"	79.56	189	11/01/86
I. Morales	Hisp.	78.63	208	11/01/88
J. Wheat	Black	78.29	210	02/17/87
M. Mathews	"	78.20	214	02/17/87
L. Muse (f/k/a Ford)	"	78.13	215	05/02/88

F. Personnel Order 96-010/010A (eff. 5/16/96)

NAME	RACE	SCORE	RANK	DOH
J. Ortega	Hisp.	78.46	206	02/19/80
V. Hibbler	Black	77.57	222	12/03/90
S. Page	"	77.33	225	05/02/88
J. Jordan	"	77.33	225	07/16/77

G. Personnel Order 96-015 (eff. 7/1/96)

NAME	RACE	SCORE	RANK	DOH
J. Rivera	Hisp.	77.38	224	12/03/90
C. Delgado	"	77.30	227	11/01/88

G. Sandoval	"	77.17	228	05/02/88
A. Frazier	Black	76.90	237	07/16/86
B. Aikens	"	75.87	252	11/01/88
E. Banks	"	75.84	253	02/16/85
A. Jones	"	75.51	255	02/17/87
W. Hankins	"	75.41	258	11/01/86
D. Kay	"	75.01	266	12/01/88

H. Personnel Order 96-028 (eff.1/1/97)

NAME	RACE	SCORE	RANK	DOH
C. Moreno	Hisp.	77.15	229	11/01/89
B. Shields	Black	76.90	237	02/21/80
M. Mendoza	Hisp.	76.52	242	02/18/80
G. Ruano	"	75.18	262	11/01/88
D. Thomas	Black	74.94	269	08/03/87
L. Travis	"	74.67	274	11/01/86
C. Hughes	"	74.55	276	02/17/87
S. Whitman	"	74.43	279	02/19/80
T. Fouch	"	74.29	281	02/17/87
S. Little	"	74.21	283	02/01/82

I. Personnel Order 97-008 (eff. 3/1/97)

NAME	RACE	SCORE	RANK	DOH
S. Straughter	Black	74.97	267	11/01/86
C. Holiday	"	74.09	284	12/03/90
B. Peace	"	73.98	286	07/16/86
E. Duncan	"	73.81	290	07/16/86
A. Tramil	"	73.38	295	08/03/87
V. Rodriguez	Hisp.	72.24	311	02/01/83
A. Aguirre	"	71.11	328	11/01/88

28. Plaintiff Francis McCann was born in Chicago on October 1, 1952, and plaintiff McCann's race is white. Plaintiff McCann, who was hired by the City of Chicago on January 2, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff

McCann's cumulative score on fire engineer promotional examination #39305 was 94.33, and plaintiff McCann's numerical ranking on fire engineer promotion eligible list #39305 was 17. Effective December 16, 1994, the four (4) minority firefighters identified in paragraph 28A, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff McCann, were promoted to fire engineer, but plaintiff McCann was passed over for promotion. Plaintiff McCann was promoted from firefighter to fire engineer effective January 16, 1995. The difference in earnings between a fire engineer (F3A) at salary step 7 ($3,991.00/month) and salary step 8 ($4,210.50/month) and a firefighter (F1) at salary step 7 ($3,685.00/month) and salary step 8 ($3,891.00/month) for the one (1) month between December 16, 1994 through January 15, 1995, amounts to *$312.75*.

29. Plaintiff Herbert Johnson was born in Chicago on July 18, 1958, and plaintiff Johnson's race is white. Plaintiff Johnson, who was hired by the City of Chicago on February 18, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Johnson's cumulative score on fire engineer promotional examination #39305 was 94.11, and plaintiff Johnson's numerical ranking on fire engineer promotion eligible list #39305 was 18. Effective December 16, 1994, the four (4) minority firefighters identified in paragraph 28A, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Johnson, were promoted to fire engineer. Plaintiff Johnson was offered a promotion effective January 16, 1995 but waived that promotion. Plaintiff Johnson was promoted from firefighter to fire engineer effective February 16, 1995.

30. Plaintiff Robert Molinari was born in Chicago on November 16, 1958, and plaintiff Molinari's race is white. Plaintiff Molinari, who was hired by the City of Chicago on

July 16, 1986, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Molinari's cumulative score on fire engineer promotional examination #39305 was 94.06, and plaintiff Molinari's numerical ranking on fire engineer promotion eligible list #39305 was 20. Effective December 16, 1994, the four (4) minority firefighters identified in paragraph 28A, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Molinari, were promoted to fire engineer, but plaintiff Molinari was passed over for promotion. Plaintiff Molinari was promoted from firefighter to fire engineer effective January 16, 1995. The difference in earnings between a fire engineer (F3A) at salary step 6 ($3,858.50/month rising to $3,935.50/month), and a firefighter (F1) at salary step 6 ($3,561.50/month rising to $3,632.50/month), for the one (1) month between December 16, 1994 through January 15, 1995, amounts to *$300.00*.

31. Plaintiff Michael Spangelo was born in Chicago on November 22, 1950, and plaintiff Spangelo's race is white. Plaintiff Spangelo, who was hired by the City of Chicago on October 16, 1978, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Spangelo's cumulative score on fire engineer promotional examination #39305 was 91.27, and plaintiff Spangelo's numerical ranking on fire engineer promotion eligible list #39305 was 40. Effective January 16, 1995, the seven (7) minority firefighters identified in paragraph 28B, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Spangelo, were promoted to fire engineer, but plaintiff Spangelo was passed over for promotion. Plaintiff Spangelo was promoted from firefighter to fire engineer effective February 16, 1995. The difference in earnings between a fire engineer (F3A) at salary step 8 ($4,210.50/month) and a firefighter (Fl) at salary step 8 ($3,891.00/month) for the one (1) month between January 16, 1995, through February 15, 1995, amounts to *$319.50*.

32. Plaintiff Robert Jurewicz was born in Chicago on August 22, 1962, and plaintiff Jurewicz's race is white. Plaintiff Jurewicz, who was hired by the City of Chicago on July 16, 1986, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Jurewicz's cumulative score on fire engineer promotional examination #39305 was 90.67, and plaintiff Jurewicz's numerical ranking on fire engineer promotion eligible list #39305 was 46. Effective February 16, 1995, the eight (8) minority firefighters identified in paragraph 28C, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Jurewicz, were promoted to fire engineer, but plaintiff Jurewicz was passed over for promotion. Plaintiff Jurewicz was promoted from firefighter to fire engineer effective August 1, 1995. The difference in earnings between a fire engineer (F3A) at salary step 6 ($3,935.50/month) and a firefighter (F1) at salary step 6. ($3,632.50/month) for the 5.5 months between February 16, 1995, through July 31, 1995, amounts to *$1,666.50*.

33. Plaintiff Ronald Michi was born in Chicago on January 7, 1957, and plaintiff Michi's race is white. Plaintiff Michi, who was hired by the City of Chicago on February 18, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Michi's cumulative score on fire engineer promotional examination #39305 was 90.03, and plaintiff Michi's numerical ranking on fire engineer promotion eligible list #39305 was 51. Effective February 16, 1995, the eight (8) minority firefighters identified in paragraph 28C, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Michi, were promoted to fire engineer. Plaintiff Michi waived promotion to fire engineer on August 1, 1995. Thereafter, plaintiff Michi waived two (2) more fire engineer promotion offers, and plaintiff Michi was removed from the eligible list based on fire engineer promotional examination #39305.

34. Plaintiff George Ryback was born in Chicago on October 22, 1950, and plaintiff Ryback's race is white. Plaintiff Ryback, who was hired by the City of Chicago on February 20, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Ryback's cumulative score on fire engineer promotional examination #39305 was 90.03, and plaintiff Ryback's numerical ranking on fire engineer promotion eligible list #39305 was 51. Effective February 16, 1995, the eight (8) minority firefighters identified in paragraph 28C, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Ryback, were promoted to fire engineer, but plaintiff Ryback was passed over for promotion. Plaintiff Ryback was promoted from firefighter to fire engineer effective August 1, 1995. The difference in earnings between a fire engineer (F3A) at salary step 8 ($4,210.50/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) for the 5.5 months between February 16, 1995, through July 31, 1995, amounts to *$1,757.25*.

35. Plaintiff Victor Walchuk was born in Chicago on October 31, 1958, and plaintiff Walchuk's race is white. Plaintiff Walchuk, who was hired by the City of Chicago on January 2, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Walchuk's cumulative score on fire engineer promotional examination #39305 was 89.92, and plaintiff Walchuk's numerical ranking on fire engineer promotion eligible list #39305 was 53. Effective February 16, 1995, the eight (8) minority firefighters identified in paragraph 28C, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Walchuk, were promoted to fire engineer, but plaintiff Walchuk was passed over for promotion. Plaintiff walchuk was promoted from firefighter to fire engineer effective January 1, 1996. The difference in earnings between a fire engineer (F3A) at salary

step 8 ($4,210.50/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) for the 10.5 months between February 16, 1995, through December 31, 1995, amounts to *$3,354.75*.

36. Plaintiff Anthony Gumpert was born in Chicago on February 8, 1955, and plaintiff Gumpert's race is white. Plaintiff Gumpert, who was hired by the City of Chicago on November 16, 1978, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Gumpert's cumulative score on fire engineer promotional examination #39305 was 88.04, and plaintiff Gumpert's numerical ranking on fire engineer promotion eligible list #39305 was 71. Effective January 1, 1996, the eight (8) minority firefighters identified in paragraph 28E, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Gumpert, were promoted to fire engineer, but plaintiff Gumpert was passed over for promotion. Plaintiff Gumpert was promoted from firefighter to fire engineer effective May 16, 1996. The difference in earnings between a fire engineer (F3A) at salary step 8 ($4,210.50/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) for the 4.5 months between January 1, 1996, through May 15, 1996, amounts to *$1,437.75*.

37. Plaintiff Raymond Kappel, Jr. was born in Chicago on January 16, 1955, and plaintiff Kappel's race is white. Plaintiff Kappel, who was hired by the City of Chicago on February 1, 1983, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Kappel's cumulative score on fire engineer promotional examination #39305 was 87.86, and plaintiff Kappel's numerical ranking on fire engineer promotion eligible list #39305 was 72. Effective January 1, 1996, the eight (8) minority firefighters identified in paragraph 28E, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Kappel, were promoted to fire engineer, but plaintiff Kappel was passed over for promotion.

Plaintiff Kappel was promoted from firefighter to fire engineer effective May 16, 1996. The difference in earnings between a fire engineer (F3A) at salary step 7 ($4,071.00/month) and a firefighter (F1) at salary step 7 ($3,758.50/month) for the 4.5 months between January 1, 1996, through May 15, 1996, amounts to *$1406.25*.

38. Plaintiff John McErlean was born in Chicago on February 27, 1957, and plaintiff McErlean's race is white. Plaintiff McErlean, who was hired by the City of Chicago on February 16, 1985, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff McErlean's cumulative score on fire engineer promotional examination #39305 was 87.63, and plaintiff McErlean's numerical ranking on fire engineer promotion eligible list #39305 was 73. Effective January 1, 1996, the eight (8) minority firefighters identified in paragraph 28E, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff McErlean, were promoted to fire engineer.

39. Plaintiff James Holtz was born in Chicago on December 11, 1954, and plaintiff Holtz's race is white. Plaintiff Holtz, who was hired by the City of Chicago on April 15, 1976, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Holtz's cumulative score on fire engineer promotional examination #39305 was 87.39, and plaintiff Holtz's numerical ranking on fire engineer promotion eligible list #39305 was 74. Effective January 1, 1996, the eight (8) minority firefighters identified in paragraph 28E, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Holtz, were promoted to fire engineer, but plaintiff Holtz was passed over for promotion. Plaintiff Holtz was promoted from firefighter to fire engineer effective May 16, 1996. The difference in earnings between a fire engineer (F3A) at salary step 8

($4,210.50/month) and salary step 9 ($4,356.50/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) and salary step 9 ($4,027.00/month) for the 4.5 months between January 1, 1996, through May 15, 1996, amounts to *$1,442.75*.

40. Plaintiff Scott Malito was born in Chicago on March 4, 1953, and plaintiff Malito's race is white. Plaintiff Malito, who was hired by the City of Chicago on March 1, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Malito's cumulative score on fire engineer promotional examination #39305 was 87.30, and plaintiff Malito's numerical ranking on fire engineer promotion eligible list #39305 was 75. Effective January 1, 1996, the eight (8) minority firefighters identified in paragraph 28E, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Malito, were promoted to fire engineer, but plaintiff Malito was passed over, for promotion. Plaintiff Malito was promoted from firefighter to fire engineer effective May 16, 1996. The difference in earnings between a fire engineer (F3A) at salary step 8 ($4,210.50/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) for the 4.5 months between January 1, 1996, through May 15, 1996, amounts to *$1,437.75*.

41. Plaintiff Kenneth Graham was born in Chicago on May 5, 1949, and plaintiff Graham's race is white. Plaintiff Graham, who was hired by the City of Chicago on November 1, 1977, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Graham's cumulative score on fire engineer promotional examination #39305 was 87.19, and plaintiff Graham's numerical ranking on fire engineer promotion eligible list #39305 was 77. Effective January 1, 1996, the eight (8) minority firefighters identified in paragraph 28E, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Graham, were promoted to fire engineer.

Plaintiff Graham was offered a promotion to engineer effective July 1, 1996 but waived that promotion. Plaintiff Graham was promoted from firefighter to fire engineer effective December 16, 1996.

42. Plaintiff Kevin McKendry was born in Chicago on January 4, 1956, and plaintiff McKendry's race is white. Plaintiff McKendry, who was hired by the City of Chicago on February 15, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff McKendry's cumulative score on fire engineer promotional examination #39305 was 87.05, and plaintiff McKendry's numerical ranking on fire engineer promotion eligible list #39305 was 80. Effective May 16, 1996, the four (4) minority firefighters identified in paragraph 28 F, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff McKendry, were promoted to fire engineer, but plaintiff McKendry was passed over for promotion. Plaintiff McKendry was promoted from firefighter to fire engineer effective July 1, 1996. The difference in earnings between a fire engineer (F3A) at salary step 8 ($4,210.50/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) for the 1.5 months between May 16, 1996, through June 30, 1996, amounts to *$479.70*.

43. Plaintiff Edward Ruder was born in Chicago on July 22, 1949, and plaintiff Ruder's race is white. Plaintiff Ruder, who was hired by the City of Chicago on February 19, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Ruder's cumulative score on fire engineer promotional examination #39305 was 86.98, and plaintiff Ruder's numerical ranking on fire engineer promotion eligible list #39305 was 81. Effective May 16, 1996, the four (4) minority firefighters identified in paragraph 28F, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Ruder, were promoted to fire engineer, but plaintiff Ruder

was passed over for promotion. Plaintiff Ruder was promoted from firefighter to fire engineer effective July 1, 1996. The difference in earnings between a fire engineer (F3A) at salary step 8 ($4,210.50/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) for the 1.5 months between May 16, 1996, through June 30, 1996, amounts to *$479.70*.

44. Plaintiff Edward Budill was born in Chicago on January 1, 1950, and plaintiff Budill's race is white. Plaintiff Budill, who was hired by the City of Chicago on March 3, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Budill's cumulative score on fire engineer promotional examination #39305 was 85.13, and plaintiff Budill's numerical ranking on fire engineer promotion eligible list #39305 was 107. Effective July 1, 1996, the nine (9) minority firefighters identified in paragraph 28G, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Budill, were promoted to fire engineer, but plaintiff Budill was passed over for promotion. Plaintiff Budill was promoted from firefighter to fire engineeer effective January 1, 1997. The difference in earnings between a fire engineer (F3A) at salary step 8 ($4,210.50/month) and a firefighter (F1) at salary step 8 ($3,891.00/month) for the six (6) months between July 1, 1996, through December 31, 1996, amounts to *$1,917.00*.

45. Plaintiff Albert W. Mirza was born in Chicago on November 27, 1957, and plaintiff Mirza's race is white. Plaintiff Mirza, who was hired by the City of Chicago on November 1, 1988, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Mirza's cumulative score on fire engineer promotional examination #39305 was 84.84, and plaintiff Mirza's numerical ranking on fire engineer promotion eligible list #39305 was 112. Effective July 1, 1996, the nine (9) minority firefighters identified in paragraph 28G, who had

lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Mirza, were promoted to fire engineer, but plaintiff Mirza was passed over for promotion. Plaintiff Mirza was promoted from firefighter to fire engineer effective January 1, 1997. The difference in earnings between a fire engineer (F3A) at salary step 6 ($3,935.50/month) and a firefighter (Fl) at salary step 6 ($3,632.50/month) for the six (6) months between July 1, 1996, through December 31, 1996, amounts to *$1,818.00.*

46. Plaintiff Peter Eck was born in Chicago on May 23, 1959, and plaintiff Eck's race is white. Plaintiff Eck, who was hired by the City of Chicago on May 2, 1988, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Eck's cumulative score on fire engineer promotional examination #39305 was 84.59, and plaintiff Eck' s numerical ranking on fire engineer promotion eligible list #39305 was 114. Effective July 1, 1996, the nine (9) minority firefighters identified in paragraph 28G, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Eck, were promoted to fire engineer, but plaintiff Eck was passed over for pro motion. Plaintiff Eck was promoted from firefighter to fire engineer effective January 1, 1997. The difference in earnings between a fire engineer (F3A) at salary step 6 ($3,935.50/month) and a firefighter (F1) at salary step 6 ($3,632.50/month) for the six (6) months between July 1, 1996, through December 31, 1996, amounts to *$1,818.00.*

47. Plaintiff William Gavin was born in Chicago on July 23, 1956, and plaintiff Gavin's race is white. Plaintiff Gavin, who was hired by the City of Chicago on February 20, 1980, was assigned to duty as a firefighter with the CFD's Bureau of Fire Suppression and Rescue. Plaintiff Gavin's cumulative score on fire engineer promotional examination #39305 was 81.94, and plaintiff Gavin's numerical ranking on fire engineer pro motion eligible list #39305 was 147. Effective

March 1, 1997, the seven (7) minority firefighters identified in paragraph 281, who had lower numerical rankings on fire engineer promotion eligible list #39305 than did plaintiff Gavin, were promoted to fire engineer, but plaintiff Gavin was passed over for promotion. The difference in earnings between a fire engineer (F3 A) at salary step 8 ($4,210.50/month) and a firefighter (FI) at salary step 8 ($3,89 1. 00/mo nth) for the six (6) months between March 1, 1997, through August 3 amounts to *$1,917.00.*

48. Plaintiffs McCann, Molinari, Spangelo, Jurewicz, Ryback, Walchuck, Gumpert, Kappel, Holtz, Malito, McKendry, Ruder, Budill, Mirza, Eck and Gavin, would have been promoted to fire engineer off of fire engineer promotional eligibility list #39305 on the dates specified except that the promotions that these plaintiffs would otherwise have received were awarded to minority firefighters and claimed by the City to be justified as affirmative action promotions.

49. The eligible list based on fire engineer promotional examination #39305 is still active.

50. All of the candidates promoted out of rank order from the list based on fire engineer promotional examination #39305 were eligible to be fire engineers because they received a passing score of 70 or higher on that test.

51. A total of 168 promotions to fire engineer were made and accepted to date from the eligible list based on fire engineer promotional examination #39305. Of those 168 promotions, 105 went to whites, 46 went to blacks and 17 went to Hispanics.

PREVIOUS JUDICIAL PROCEEDINGS IN THE CASES

This court acknowledges this opinion is not being written on an entirely clean slate. This court back in 1990 in Case Number 87 C 7295, which deals with the 1985 engineer exam #40001 and the 1987 captain exam #68737 addressed, in

a summary judgment posture, *Chicago FireFighters v. Washington*, 736 F. Supp. 923 (N.D.Ill. 1990), certain issues confronted at trial. Although a panel of the Seventh Circuit affirmed that decision in a consolidated appeal with another case, *Billish v. City of Chicago*, 962 F. 2d 1269 (7th Cir. 1992), the Seventh Circuit in an en banc opinion, with five judges constituting the majority and with four judges dissenting, vacated the panel opinion, reversed the district court decisions and remanded with directions, *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir.1993) (en banc). Three additional cases were filed in the district court in 1993 and another in 1996, raising similar constitutional issues regarding other promotions in the CFD.

In early 1997, with the consent of the parties, District Judge Suzanne Conlon commenced the trial of one of the cases filed in 1993, *McNamara v. City of Chicago*, 93 C 1098 (N.D. Ill.). That trial addressed issues raised by certain non-rank order, minority promotions following the 1987 captain exam #68737. The evidence in the record before District Judge Conlon in the *McNamara* trial, much of which is by stipulation also before this court as evidence in the trial of these five consolidated cases, prompted Judge Conlon to find that the non-rank order minority promotions from the list developed as a result of the 1987 captain exam passed constitutional muster. *McNamara v. City of Chicago*, 959 F. Supp. 870 (N.D. Ill. 1997).

In 1998, the Seventh Circuit in addressing the appeal, *McNamara v. City of Chicago*, 138 F.3d 1219 (7th Cir.1998), stated that affirmative action to be legally justified, "requires proof both that the City engaged in racial and ethnic discrimination in the employment of firefighters in the past and that the remedy is narrowly tailored to the violation, which means, as a practical matter, that it discriminates against whites as little as possible consistent with effective remediation." *Id.* at 1222.

The Seventh Circuit affirmed Judge Conlon's decision in *McNamara* and found there was "direct evidence of racial discrimination in the Chicago Fire Department up to and into the 1980s, much of it concerning the racial policies of senior officials of the department, including one Fire Commissioner." *McNamara*,138 F.3d at 1224.

The Seventh Circuit found also that the evidence before Judge Conlon was sufficient, "to justify the judge's conclusion that until sometime during the 1980s the people running the fire department endeavored with considerable success to make the department uncongenial to African-Americans and Hispanics. This conclusion in turn justified an inference that the under representation of African-Americans and Hispanics in the various ranks, including that of captain, was due, at least in part, to discrimination by the City." *Id.*

Instructively, the Seventh Circuit stated in *McNamara*: "[I]n a case in which the justification for affirmative action is remedial . . . [t]he test is . . . whether the increase is a plausible lower-bound estimate of a shortfall in minority representation . . . that is due to the fire department's intentional discrimination in the past." *Id.* The Seventh Circuit held that the several non-rank order minority promotions to the rank of fire captain at issue in *McNamara* survived strict scrutiny and were constitutionally permissible. *Id.*

The precedent generated by these previous related proceedings provides the legal basis for the analysis of the issues presented in these five cases consolidated for trial. This court adopts and incorporates the findings and conclusions in the *McNamara* case because the same evidence was presented here, along with further evidence which fortifies the correctness of the rulings in *McNamara*. With that said, this court will address whether the minority promotions within the CFD challenged in these cases are violative of the Constitution.

THE ISSUES PRESENTED

The City's admitted use of race or ethnicity as a criterion for certain CFD personnel being promoted ahead of the plaintiffs, who are not of that race or ethnicity, is contrary to the constitutional principle of equal protection enunciated in the Fourteenth Amendment. In 1989, a majority of the Supreme Court held that a racial classification used for governmental "affirmative action" to aid members of a minority should be subject to strict judicial scrutiny, and should not be upheld unless the government demonstrates that the racially discriminatory classification was narrowly tailored to promote a compelling governmental interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Thus, the City has the burden to present strong evidence of the compelling governmental interest that the City specifically identified as requiring remediation, and that the action the City took in response was narrowly tailored to accomplish the remedial purpose with minimal injury to the rights accorded others by the Fourteenth Amendment.

The primary issues crystalized at trial by counsel for the parties, given the City's concession of discrimination in favor of certain African-Americans and Hispanics in CFD promotions from 1987 to 1997, can be categorized under the applicable case law into four general areas:

(1) Whether certain of the individual plaintiffs have standing to bring the claims brought in these cases?

(2) Whether the City engaged in intentional discrimination against African-Americans and Hispanics in enployment and promotion within the CFD in the past?

(3) Whether, and for how long, the effects of any intentiona1 discrimination lingered within the CFD?

(4) Whether the CFD's non rank order promotions constituted narrowly tailored remediation of the past intentional discrimination, if any, within the CFD?

Each issue is addressed below.

STANDING

In addressing this issue, the court initially notes that the City, through its counsel, has raised varying factual circumstances under the general umbrella of standing through which the City contests the right of certain plaintiffs to recover damages for themselves even if the City's affirmative action promotions violated the law. The court will address each factual circumstance under the headings set out below.

Waiving Promotion After Being Passed Over

In Case Number 87 C 7295, dealing with promotions after the 1985 fire engineer exam #40001, plaintiffs Kammerer and Anoman, and in Case Number 96 C 808, dealing with promotions following the 1994 fire engineer exam #39305, plaintiffs Michi, Johnson, Graham and McErlean each waived promotion to fire engineer when it was first offered to them by the CFD. That offer, however, came after the time each of these plaintiffs would have been offered promotions if the CFD had not adopted the affirmative action polices in dispute. This court does not find that these plaintiffs' waivers of the promotion offers made to them by the CFD after these plaintiffs had been passed over for promotion by the CFD to be equivalent to a waiver of their constitutional right to be free from racial discrimination in employment promotions. Although it appears these plaintiffs failed to fully mitigate their damage claims for back wages by their waivers, they did not forfeit their standing to sue for permissible compensatory damages arising from whatever harm they suffered. They were each passed over in furtherance of the City's affirmative action policies, and therefore have standing to sue. *See generally, Carey v. Piphus*, 435 U.S. 247 (1978); *Price v. City of Charlotte*, 93 F.3d 1241,1245-48 (4th Cir. 1996). Had these plaintiffs not been passed over pursuant to the City's affirmative action plans they would, of course, lack standing.

Ranking Below the Strict Rank Order Cut-Off

In Case Number 87 C 7295, plaintiff Centracchio ranked #421 on the 1985 fire engineer exam #40001. Had the promotions followed strict rank order, the lowest ranked person who would have been promoted held the rank #379. Even with the extra promotions resulting from the City's "wrap around" agreement with the Department of Justice, the last person, who would have been promoted ranked #417 (Joyce at 97). Had there been no racial favoritism by the City pursuant to its affirmative action policies, plaintiff Centracchio still would not have been promoted. He therefore lacks standing. *See McNamara*, 138 F.3d at 1221.

Filing Suit Too Late

In Case Number 89 C 7984, which deals with the promotions made after the 1989 battalion chief exam #88001, the City contends that plaintiff Mark Poland's equal protection claim arose on December 24, 1994, when the CFD issued Personnel Order 94-024 promoting the last six captains promoted from that list to battalion chief from the results of the 1989 battalion chief exam #88001. Those promotions became effective on January 1, 1995. Plaintiff Poland was first proposed as a party in this action in a letter from plaintiffs' counsel to defendants' counsel on January 21, 1997. Plaintiff Poland did not file a complaint or otherwise move to be added to Case Number 89 C 7984 until the parties filed a joint stipulation to amend the complaint and defendant's answer in that case on June 25,1997.

As of January 1, 1995, the CFD had promoted 103 battalion chiefs through rank #108 on the 1989 eligible list plus four minority battalion chiefs out of rank order: Larry Muse (rank #113, score 83.63), Larfette Cooks (rank #116, score 83.34), Miguel Bautista (rank #118, score 83.14) and Garland Boston (rank #135, score 80.15), for a total of 107 promotions. As of December 24, 1994, plaintiff Poland (rank

#110, score 84.13) knew or should have known hat if those 107 promotions had been made in rank order, the CFD would have reached at least rank #112 on the list after the January 1, 1995 promotions. Thus, plaintiff Poland knew or should have known, at the latest, on January 1, 1995, that he had suffered an injury as a result of the City's affirmative action. The statute of limitations governing claims brought pursuant to 42 U.S.C. § 1983 is two years, *Ashafa v. City of Chicago*, 146 F.3d 459, 461 (7th Cir.1998). The statute of limitations on Poland's claim began to run on January 1, 1995 and his claim became untimely on January 1, 1997.

Plaintiff's argument that his claim did not arise until after the compilation the battalion chief eligibility list following the 1994 battalion chief examination is unavailing. Even if Poland had been promoted from the 1994 exam list, he still would have had a claim which arose, at the latest, on January 1,1995 just as the vast majority of the plaintiffs in these cases have asserted even though they were promoted after being passed over as a result of the City's affirmative action policies.

Title VII Claim

In Case Number 93 C 6175, the 45 individual plaintiffs purport to bring Count II of their Sixth Amended Complaint as a class action under Federal Rule of Civil Procedure 23 pursuant to Title VII of the Civil Rights Act of 1964, as amended, and allege that the City's practice of promoting minority candidates in non-rank order but within bands of scores is the equivalent of race norming, a practice plaintiffs contend was barred by Section 106 of the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(1).

None of the plaintiffs, except plaintiff Richard Temple filed a charge of discrimination with the EEOC under Title VII challenging the City's decision to band the 1993 lieutenant examination scores for purposes of making selections for promotion. Because the remaining plaintiffs in

Case Number 93 C 6175, failed to exhaust their requisite administrative remedies, they cannot bring a Title VII action challenging banding under Section 106 of the Civil Rights Act of 1991. *Perkins v. Silverstein*, 939 F.2d 463, 469-71 (7th Cir.1991). Consequently, the plaintiffs, other than Richard Temple, lack standing to bring the claims as alleged in Count II of their complaint under Title VII.

As to the class action allegation in Count II, the Supreme Court has stated that "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Tel. Co. v. Falcon*, 457 U.S. 147,161(1982); *Woodall v. Drake Hotel*, 913 F.2d 447,4 50 (7th Cir.1990); *Koch v. Standard*, 962 F.2d 605, 607 (7th Cir. 1992). Rule 23(c)(1) mandates that the district court determine whether a class should be certified "as soon as practicable" after the commencement of the action; *Van Harken v. City of Chicago*, 906 F. Supp. 1182, 1186 (N.D.111 1995). The burden of showing compliance with Rule 23 requirements for class certification rests with the plaintiffs. *Trotter v. Klincar*, 748 F.2d 1177, 1184 (7th Cir. 1984); *Allen v. City, of Chicago*, 828 F. Supp. 543, 550 (N.D.111.1993). In this case, plaintiffs have neither moved for class certification nor complied with the exacting requirements of Rule 23 despite the fact that they first amended their complaint to add Count II, the Title VII class act ion claim on October 3, 199 5. In fact there is no showing that any person other than plaintiff Richard Temple has fulfilled the obligations required to be a member of a class of Title VII plaintiffs as alleged in Count 11. Therefore, the class action allegations contained in Count II of the Sixth Amended Complaint in Case Number 93 C 6175 are stricken.

INTENTIONAL PAST DISCRIMINATION

In addressing the issue of whether blacks and Hispanics were intentionally discriminated against in the past by the

CFD [4], this court must start with the premise that in *McNamara*, both District Judge Conlon and the Seventh Circuit concluded "that until sometime during the 1980s, the people running the fire department endeavored with considerable success to make the department uncongenial to blacks and Hispanics." *McNamara*, 138 F.3d at 1224.

The plaintiffs here, of course, were not parties in the *McNamara* case, and had no opportunity during the *McNamara* trial to contest or refute that evidence. In the trial before this court, the plaintiffs through their counsel had ample opportunity to do so because much of that same evidence was presented here. The historical evidence of hiring and promotions within the CFD presented here which included anecdotal evidence, statistical evidence, and evidence of admissions by both the City and Local 2 of past intentional discrimination within the CFD, clearly established that District Judge Conlon and the Seventh Circuit were correct in *McNamara*, when they held "that the under representation of blacks and Hispanics *in the various ranks*, including that of captain, was due, at least in part to discrimination by the City," *Id.* (emphasis added).

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[4] Although remedying past intentional discrimination is the compelling governmental interest primarily advanced by the City as the justification for its considering race or ethnicity in making the disputed promotion decisions, the City has raised other circumstances as possible justifications, such as complying with Title VII, due to the adverse impact on minorities of certain tests, or complying with consent decrees. The Seventh Circuit has recognized that appropriate justification can stem from circumstances other than to remedy past intentional discrimination, such as the necessity to accomplish important law enforcement objectives in the context of promotions within prison security staff. *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996). The court does not address whether a compelling governmental interest existed other than to remedy the lingering effects of the intentional past discrimination within the CFD through the narrowly tailored remediation of limited non-rank order promotions of eligible minority candidates due to the court's determination on that issue.

Pertinent Historical Facts

A brief sketch of the key historical facts is appropriate. Although this court does not intend to provide a detailed historical chronology of the various anecdotal incidents to which numerous witnesses testified demonstrating the racial and ethic discrimination that have occurred over the past decades in the CFD, it is important to note from an historical perspective, as plaintiff's counsel conceded in closing argument, the policy of segregation which persisted in the CFD until 1965 constituted "purposeful discrimination." (CFFU Tr. at 4877). The evidence established that "purposeful discrimination" was the policy of t he City's Fire Commissioner Robert J. Quinn during his tenure from 1957 to 1977. Commissioner Quinn, who only grudgingly began integrating the CFD in 1965 after complaints and public riots against the CFD's racist policies, made clear his racial and ethnic animus in several ways. Commissioner Quinn referred to the CFD's integrated snorkel squads derogatorily as "freedom wagons." (McNamara Tr. at 377). In the early 1970s, Commissioner Quinn was explicit in his ethnically biased belief that Hispanics as an ethnic group were not tall enough to fight fires in Chicago. (McNamara Tr. at 372-74). Commissioner Quinn also expressed his resistance to racial integration (CFFU Tr. at 736-39) to James Winbush, an African-American in the CFD and one of the founders of the African-American Firefighters League, who was known to Commissioner Quinn to be concerned about the CFD's racial discrimination in the hiring and promotion of blacks:

> "What are you worrying about them niggers for? They're only going to come in and screw up our job." (McNamara Tr. at 374-75).

During the twenty years of Commissioner Quinn's term as the head of the CFD, as the racial and ethnic population of Chicago increased dramatically, the percentage of minority CFD personnel remained stagnant at approximately at less

than 5%. *McNamara*,138 F.3d at 1223. Consistent with Commissioner Quinn's expressed prejudices, the pattern of intentional past discrimination by other City officials dealing with CFD applicants continued through that same time period when City officials used the pretext of physical deficiencies such as "heart murmurs," and "flat feet," or pretextual job requirements such as a minimal height requirement to exclude minority applicants to the CFD. (CFFU Tr. at 630-31, 406-09, 437, 2263-64, 3629-31; DXs 7-1, 7-2, and 7-3). Alderman Leon Depres testified at trial how from the mid-1960s to the mid-1970s he continually complained to City officials, including Commissioner Quinn, in writing and in person about the racially discriminatory hiring, promotional and other practices of the CFD to no avail. (CFFU Tr. at 2528, 2534, 2583-84, 2592; DXs 24-1 to 24-14). His complaints were ignored as part of the City's intentional pattern of racial and ethnic discrimination. When the City in 1974 agreed to the entry of a consent decree (JX H-7; JX H- 8), in a law suit brought by the Department of Justice, *United States v. City of Chicago*, 73 C 661(N.D. I11), which established an interim 50 percent minority (black and Hispanic) hiring ratio and a long range hiring goal to increase the minority composition of the CFD, a hiring freeze was put in effect at the CFD to preclude the consent decree's implementation. To avoid hiring minority firefighters, the CFD hired no firefighters during 1974, 1975, and 1976 even though vacancies existed and funding was available. (CFFU Tr. at 1273-74, 3660-62). Likewise, no promotions were made to any of the CFD promotional ranks during this same period. (Joyce Dir. at 19).

In the 1970s, the racial and ethnic prejudices in the CFD were known in Chicago's minority communities, and deterred potential minority applicants who believed job opportunities at the CFD were not available to them. (McNamara Tr. at 235-38, 252-255; CFFU Tr. at 270-73). Potential minority applicants also believed that minority firefighters were not

appreciated by the CFD because minorities were given more unpleasant assignments than whites. (Joyce Dir. at 17; CFFU Tr. at 2284-84). Potential minority applicants viewed fire fighting in the CFD as a "white man's job" (McNamara Tr. at 886-87) because of the CFD's intentional discrimination against minorities.

Even after the CFD hiring freeze was lifted in 1977 and the CFD'started to hire minorities in greater numbers than before, certain CFD officials still harbored racial and ethnic bias. For example, at a CFD meeting prior to the start of the 1977 training class, the CFD Director of Personnel, who is white said of minorities: "They can make us hire them but they can't make us keep them." At that meeting, another CFD official, who is white, also said of minorities: "We're not going to allow them to take over this Department." (McNamara Tr. at 576-79).

It is undisputed that those African-Americans and Hispanics who applied and were hired by the CFD performed just as well as whites. (CFFU Tr. at 110-13;278-79). In the late 1970s to early 1980s those minority members of the CFD found advancement to be slow compared to whites (DX 17-26; DX 17-31), and found it difficult to obtain good assignments compared to their white counterparts. There appeared to be a sequencing of minorities in the CFD's upper ranks. (DX17-31). A minority candidate for promotion would not be promoted to the upper ranks unless another minority vacated the position. Minorities were not given the same opportunity as whites to take the responsibilities of a higher position, and thereby gain experience that would help minorities advance to the CFD's upper ranks. (DX21-5).

A way minorities were intentionally kept from advancing in the CFD was that they received lower promotional scores than whites through the use of subjective efficiency ratings by CFD officials. These subjective efficiency ratings were initially placed on the promotional applicant's score card in

pencil by the promotional applicant's line supervisor. Efficiency ratings were then altered as consideration of minority promotional applicants moved up the CFD command structure. During Commissioner Quinn's term, he had the final say on what efficiency mark a promotional applicant would receive. Minorities historically received lower marks than whites (McNamara Tr. at 296-97, 678-79) due to Commissioner Quinn's intentional discrimination against minorities. After Richard Albrecht became Fire Commissioner in 1978, blacks seeking promotion continued to receive subjective performance efficiency ratings substantially lower than whites. In fact as to the efficiency scores awarded in connection with the 1978 captain examination, 40% of the white lieutenants seeking promotion were scored higher than the highest black lieutenant seeking promotion. (Joyce Dir. at 27, 32; DXs 14-1,14-9; McNamara Tr. at 856-57, 862-63; CFFU Tr. at 1252,1255,1291-93). When Louis Galante was appointed CFD Fire Commissioner in 1983, he examined past efficiency ratings and the it effect on minorities. He found minorities efficiency ratings were always much lower than whites sometimes 10 to 14 points lower. (CFFU Tr. at 125 3-1255). Commissioner Galante concluded, based on his actual knowledge of CFD fireground operations and how certain minority fire officers ran their companies, that the efficiency ratings those minority officers had been given in the past were unfair. Commissioner Galante testified that the minority officers, whose scores he examined, should have been scored higher and should have had efficiency ratings at least as high as some of the white officers. (CFFU Tr. at 1255-1256).

Because of the hiring and promotional freeze from 1974 to 1977, as well as normal attrition from the CFD (McNamara Tr. at 292-93), by the late 1970s, the CFD was understaffed at all levels of uniformed fire personnel. In the absence of fire officers in certain of the upper ranks of the CFD, during this

period, lower ranking fire personnel had to "act up" or assume an officer duties above their assigned ranking. These fire officers were not financially compensated for the time when they acted up. Many members of the CFD became dissatisfied with the situation because the lack of manpower increased injuries and fire related deaths (CFFU Tr. at 1274-75) and decreased the morale of CFD firefighters. (CFFU 1273-74). On February 14, 1980, most of the CFD personnel went on strike.

In attempting to remedy the strike, during meetings among City officials, Local 2 officials, African-American firefighters, and others in February 1980, Mayor Jane Byrne admitted that there had been discrimination in the CFD against minorities and that she was going to change things. (CFFU Tr. at 716-17). At that time, Local 2 representatives also acknowledged their awareness of the discrimination in the CFD against minorities. (CFFU Tr. at 718). In further meetings during the strike between Local 2 officials and City officials on February 22 or 23, 1980, certain of Local 2's officials agreed that there had been discrimination against blacks and Hispanics and agreed that these issues needed to be resolved. (CFFU Tr. at 720). Out of the various meetings that occurred before the strike ended on March 8, 1980, came the first collective bargaining agreement between the City and Local 2. A pertinent provision that was agreed upon by both the City and Local 2 is what the parties now call Appendix G to the collective bargaining agreement (JX H-6, pp. 69-71). A part of Appendix G, to which both the City and the membership of Local 2 agreed, pertinent to the issue of whether there had been intentional past discrimination against minorities is Section 3.B.3 entitled "Remedying Past Discrimination." It states as follows:

> There shall be an immediate review of the status of all Black and Hispanic firefighters in order to determine those whose time in grade would make them eligible for

promotion had not discriminatory practices existed in the past. Within 90 days of each anniversary date of the signing of this contract, the Department shall review the status of all Black and Hispanic members of the force to identify those whose time in grade is equivalent to others who have received promotions. The Department shall examine the circumstances of each such member of the force and prepare a written report stating whether there is any reason other than past racial discrimination for the failure of such individual to achieve promotion, and, if so, the facts supporting the conclusion. Where it is found that there is a reason for non-promotion which can be remedied by appropriate training or educational opportunity, special arrangements shall be offered to enable such individual to have the necessary training or educational opportunity. Where no reason other than past discrimination is found for nonpromotion of such individuals, preference will be given for the next promotion or promotions available. Where promotions are made on the basis of examination, such past discrimination shall be remedied by giving, in the case of those who achieve a passing grade in such examinations and other otherwise qualified, preference over other candidates for promotion with equal or lesser length of service. (JX H-6, p. 70).

Additionally, Section 2.A. of Appendix G, which deals with goals for hiring and recruitment within the CFD, agreed upon by Local 2 and the City in 1980, states:

> The parties agree that hiring and recruitment programs of the Fire Department shall have as a goal to achieve in the shortest possible time a total force in which approximately thirty percent shall be Black and fifteen percent Hispanic. To this end, the hiring and recruitment programs should aim to assure that at least 45% of all recruits added to the force hereafter shall consist of

> Blacks and Hispanics. Within 90 days of the effective date of this Agreement the City will publish the initial steps it plans to take to remove all racial inequalities in the Chicago Fire Department.

(*Id.* p. 69).

These 1980 acknowledgments by both the City and Local 2 of intentional past discrimination in CFD promotions, along with all the other facts presented at trial, are strong evidence establishing the compelling government interest of the need for remedial measures to rectify the intentional past discrimination within the CFD.

On March 31, 1980, less than a month after the 1980 strike ended, a further consent degree (JX H-11) was reached between the Department of Justice and the City, in *United States v. Albrecht*, 80 C 1590 (N.D. Ill.) and in the previous litigation, *United States v. City of Chicago*, 73 C 661 (N.D. Ill.). In this consent decree, which was referred to as the *Albrecht* Settlement Order, the City agreed to a long-term promotional goal which would require the City to increase minority participation at each rank substantially (including captain and battalion chief), so that the minority composition of each promotional rank would mirror the racial composition of the preceding rank. (JXH-11). That decree also mandated the City's Compliance with Title VII, 42 U.S.C. § 2000e *et seq.* (as amended). The 1985 fire engineer, 1986 fire lieutenant,[5] 1987 fire captain, and 1989 battalion chief examinations were the first promotional examinations given after the City agreed to the Albrecht Settlement Order. (Joyce Dir. at 68, 101, 124).

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[5] Local 2 and a class of intervening plaintiffs have challenged that examination in an action titled *Chicago Fire Fighters Union Local No. 2 v. City of Chicago*, No 88 C 3773, which is pending before this court. That action does not challenge non-rank order promotions and was not consociated with the cases at issue in this proceeding.

Statistical Evidence

Statistics alone cannot prove intentional discrimination in hiring or promotions. As the Seventh Circuit observed in *McNamara*, a variety of factors "bear on eligibility and suitability for, and the choice of, a particular occupation." McNamara,138 F.3d at 1223. Yet, the only discrimination for which an employer is liable is that in which the employer engages. *Id.* Significant statistical disparities, which are not explained by the evidence presented other than as consistent with intentional discrimination, constitute evidentiary support and when taken together with anecdotal evidence of intentional discrimination justify a finding of intentional discrimination. This is especially true where, as here, the statistics reveal patterns that cannot be explained as anything other than consistent intentional discrimination and there is strong anecdotal evidence supporting a finding of past intentional discrimination against minorities.

In presenting its statistical evidence, the defense presented, and this court accepted, Dr. Gerry Suchanek as sufficiently qualified in the fields of economics, labor economics, statistics and econometrics to allow him to provide an expert opinion in those areas at the trial, (CFFU Tr. at 918), even though labor economics was not his primary area of expertise. In preparing to give his opinion Dr. Suchanek analyzed appropriate population figures and used a progressively restricted, interested and qualified labor pool population. Dr. Suchanek commenced the restriction of the general population data with the announced job requirements for the entry level firefighter position of age (between 19 and 35), and residency (City of Chicago), as well as restricting for gender (because only men historically applied). He used also the corresponding wage and benefit structure to develop a census based labor pool. He later analyzed CFD actual applicant flow data using incentive models and factored in the year of hire information to account for non-discriminatory delays in

the processes of the CFD. In defining the census-based labor pool, Dr. Suchanek considered the effect of alternative employment opportunities available, their corresponding wage and benefit structures for whites, blacks and Hispanics given the qualifications necessary for the job of firefighter with the CFD. He also considered immigration and education data. Of course, statistical disparities, such as those found by Dr. Suchanek here, are not relevant unless shown to be derived from an analysis within the proper labor economic framework including consideration of the proper benchmark labor pool populations, incentives and disincentives to application, and examination of possible economic explanations for the observed disparities. Dr. Suchanek complied with these relevancy requirements and his thorough examination of the data, up through trial, made his opinions reliable.

The court accepts Dr. Suchanek's testimony that the census-based labor pool benchmark population restricted by age, sex, residency and year of hire information was an appropriate and reliable estimate of the upper limits of the qualified and interested labor pool population. This was unrefuted because plaintiffs did not present any expert who was qualified to offer an opinion regarding the appropriateness or inappropriateness of this benchmark labor pool. Dr. Suchanek's control group was recognized by the Seventh Circuit in *McNamara* as an appropriate measure of the qualified and interested pool for purposes of conducting analyses of the statistical disparities between the actual and expected minority representation in the CFD as a whole and in the rank of captain. *McNamara*, 138 F.3d at 1223. Additionally, Dr. Suchanek's census-based labor pool is consistent with the actual applicant flow data for the years 1974 through 1995.

Dr. Suchanek further restricted his benchmark populations to more precisely analyze if factors other than intentional race

and ethnic discrimination could explain the disparities that he found. Dr. Suchanek, by using the series of benchmarks, considered issues such as interest in the job, selfselection, and clustering. He also considered hire rate data and used actual CFD workforce data in reaching his conclusions. In rendering his opinion, he provided the court a range in which to evaluate his conclusions. The census-based labor pool set the upper-bound estimate of the qualified and interested pool. When he discounted this data to account for the sustainable hire rate, Dr. Suchanek set the lower bound estimate of the qualified and interested pool. The actual qualified and interested pool appropriately falls somewhere between these two estimates. (CFFU Tr. at 1155-57).

Plaintiffs' counsel raised arguments attacking the reliability of Dr. Suchanek's analysis on a number of bases. Yet, plaintiffs presented no evidence showing any bases that would explain the significant disparities found by Dr. Suchanek other than past intentional discrimination by the CFD. One area plaintiffs' counsel attacked was Dr. Suchanek's not restricting for education. There, of course, were no formal educational requirements historically before 1985 at the entry level of firefighter or for any CFD promotion. (CFFU Tr. at 1053-54, 2817; DX7-1 to 7-6). Moreover, many of the skills that a firefighter needed to perform at both the entry and promotional levels could be obtained through on-the-job training and experience because the job is a performance based job. (CFFU Tr. at 2832). Additionally, the evidence is undisputed that there was no difference in performance in the CFD between minorities and non-minorities. (CFFU Tr. at 110-13, 278-79). For these reasons, restricting the qualified pool for more than minimal reading and language skills would unnecessarily exclude many individuals in the labor market who could meet the requirements to be a Chicago firefighter. (CFFU Tr. at 1055).

To demonstrate that education restrictions would not explain the observed disparities, Dr. Suchanek further restricted the census-based labor pool population to only those individuals who had at least a high-school diploma but who did not have a four-year college degree (12-16 years of education). Even using this education assumption, these educational adjustments to the labor pool population did not explain the huge observed disparities in minority representation in the CFD career service ranks of firefighter, engineer, lieutenant, captain and battalion chief historically. (CFFU Tr. at 1051-52, 1063- 67, 1069- 70, 2801, 2803, 2810; DX17-11). None of the other attacks by plaintiffs' counsel on Dr. Suchanek's opinions had merit.

Once Dr. Suchanek properly identified the labor pool, he then conducted a binomial distribution analysis, using race as the distinguishing variable, to determine whether the selection process was race-neutral. Dr. Suchanek's benchmark labor pool analysis was carefully crafted, reliable and consistent with the statistical analyses recognized by numerous courts, including the Supreme Court, as probative of discrimination in these types of discrimination cases. *Croson*, 488 U.S. at 501-02. As Dr. Suchanek testified, if the selection process is race-neutral, one would expect minorities and non-minorities to be selected for hire from the qualified and interested labor pool in a relatively representative manner. (CFFU Tr. at 2121-22, 2767, 982, 984-85).

Although the parties presented a substantial amount of statistical evidence and even revised some of the evidence during trial, the key statistical exhibits presented in the case are DX17-27 and DX17-28 which evinced the shortfall in minority representation at all CFD uniformed levels in terms of percentage and standard deviation respectively. This shortfall determination was required to properly test the City's affirmative action plans. *McNamara*, 138 F.3d at 1224. DX17-27 is an analysis of an appropriate sampling of the

actual CFD workforce population compared to the appropriately restricted census-based labor pool population that Dr. Suchanek utilized in this case to form the opinions he espoused. The benchmark labor pool population used in DX17-27 compared the actual and expected racial compositions of the firefighter rank and the uniformed promotional levels in the CFD between the years 1950 thro ugh 1992. The expected value as adjusted by the year of hire also accounted for demographic changes in the population between hire and observation year by using the year of hire of all active personnel in a given rank in a given year as found in the underlying data set based on CFD records. (CFFU Tr. at 4613-14). Given the actual applicant flow reflected in CFD records (DX 17-11), it is clear that DX17-27 is an accurate annual reflection of the proper qualified and interested labor pool and is an appropriate benchmark for making comparisons between actual and expected minority representation in the CFD. (CFFU Tr. at 4629).

Although the analysis reflected on DX17-27 goes back to 1950, plaintiffs' counsel conceded in closing arguments that prior to 1965 the CFD engaged in purposeful discrimination. Considering the first fifteen years (1950 to 1965) reflected on DX17-27 for its historical significance, the court focused on the fifteen years from 1965 to 1980 and found stark disparities between the percentage of minorities expected in the CFD ranks and the percentage of minorities who actually were in the ranks based on the sample reflected in DX17-27. These disparities are consistent with the pattern of past intentional discrimination within the CFD (CFFU Tr. at 4629-30) shown by the other evidence. DX17-27 reflects that the percentage of minority firefighters from 1966 through 1976 to be less than 5 percent which is consistent with the observations made by the Seventh Circuit in *McNamara*,138 F.3d at 1223:

> Until comparatively recently, the City employed very few minority firefighters relative to their proportion of the city's population. As late as 1974, only 4 percent of the firefighting force was black and only one-half of 1 percent was Hispanic (figures essentially unchanged from 1950, the earliest year for which there are statistics in the record), even though blacks and Hispanics accounted for a much higher percentage of the city's population. (Blacks alone were almost a third of the city's population in 1970.)

In evaluating the data reflected on DX17-27, for the years 1965 to 1980, on average the percentage difference of minorities in the actual per rank sample verus the percentage expected is stark and consistent with intentional discrimination. The following are some examples of what the data on DX17-27 reveals:

> In the rank of firefighter for the years from 1965 up to 1980, the average percentage of blacks was expected to be 28.56% and the actual percentage was 4.64%, a percentage shortfall of 23.92% for that period. Of Hispanics, the average percentage expected in the fire fighter rank was 6.64% and the actual percentage was .86%, a percentage shortfall of 5.78%. (DX17-27, EO00045).

In the rank of fire engineer for the years from 1965 up to 1980, the average percentage of blacks was expected to be 24.05% and the actual percentage was 5.21%, a percentage shortfall of 18.84% for that period. Of Hispanics, the average percentage expected in the fire engineer rank was 4.14% and the actual percentage was. 16%, a percentage shortfall of 3.98%. (DX17-27, EO00042). In the rank of lieutenant for the years from 1965 up to 1980, the average percentage of blacks was expected to be 23.10% and the actual percentage was 1.73%, a percentage shortfall of 21.37% for that period. Of Hispanics, the average percentage expected in the

lieutenant rank was 3.82% and the actual percentage was .76%, a percentage shortfall of 3.06%. (DX17-27, E000039).

In the rank of captain for the years from 1965 up to 1980, the average percentage of blacks was expected to be 19.97% and the actual percentage was 5.15%, a percentage shortfall of 14.82% for that period. Of Hispanics, the average percentage expected in the captain rank was 2.82% and the actual percentage was 1.05%, a percentage shortfall of 1.77%. (DX17-27, E000036).

In the rank of battalion chief for the years from 1965 up to 1980, the average percentage of blacks was expected to be 16.84% and the actual percentage was 2.64%, a percentage shortfall of 14.2% for that period. Of Hispanics, the average percentage expected in the battalion chief rank was 2.05% and the actual percentage was. 12%, a percentage shortfall of 1.93%. (DX17-27, EO00033).

The minority underrepresentation shown in terms of standard deviations for the various CFD ranks reflected in DX17-28 is clear. The disparities between the actual and expected minority representation in the CFD promotional ranks of engineer, lieutenant, captain and battalion chief, using the year of hire restricted benchmark labor pool population, greatly exceeded three standard deviations and were statistically significant. (CFFU Tr. at 1104, 4626-28). Even when a 28% discount is applied to account for the sustainable hire rate, the statistical disparities measured by standard deviations on DX 17-28 continue to exceed that which represent chance occurrences (CFFU Tr. at 4674-75) and at all levels equal or exceed three standard deviations. (CFFU Tr. at 4743). These disparities were consistent with the antecdotal evidence of past intentional discrimination at the CFD in hiring, and in promotions at each of the CFD promotional levee engineer (CFFU Tr. at 1104-05); lieutenant (CFFU Tr. at 1005-09); captain (CFFU Tr. at 1009-11, 4626, 4629-35); and battalion chief (CFFU Tr. at 1011-14), (*see*

also CFFU Tr. at 1112, 1116, 1130, 4627-35). These and are the type of gross statistical disparities that constitute proof of a pattern of past intentional discrimination within the CFD. *See, Croson*, 488 U.S. at 501-02.

Having determined that the City has presented strong evidence of the CFD's past intentional discrimination against African-Americans and Hispanics that could be characterized or "pervasive, systematic, and obstinate discriminatory conduct," *see*, *United States v. Paradise*, 480 U.S.149,167 (1987), the court now turns to consider the lingering effects thereof, if any, within the uniformed promotional ranks of the CFD.

LINGERING EFFECTS OF DISCRIMINATION

Promotions in the CFD can only come from CFD personnel in the immediate lower rank, and promotions to the rank of lieutenant can be made from both the firefighter and fire engine ranks. Applicants for promotion have to have held the lower rank for a sufficient to complete the probationary period required o f that lower rank. Promotional examinations are given only as the needs of the CFD arise. For example beginning in 1974 and continuing through 1985, the CFD only had three examinations for the entry position of firefighter: 1974, 1978, and 1985.

The dates and exams an individual had to meet and pass to be listed as eligible for promotion on each of the six promotional lists at issue here were as follows:

1985 Engineer Examination #40001 List

Rank(s) eligible to take engineer test: Firefighter
Date by which candidate had to be hired as a firefighter to be eligible to take the 1985 engineer test: September 28, 1984

Latest firefighter examination candidate could have taken in order to be hired by September 28,1984: 1978 firefighter exam

1987 Captain Examination #68737 List

Rank(s) eligible to take captain test: Lieutenant
Date by which candidate had to be a lieutenant to be eligible to take the 1987 captain test: September 8, 1986
Latest lieutenant examination candidate could have taken in order to be promoted to lieutenant by September 8,1986: 1978 lieutenant exam
Date by which candidate had to be hired as a firefighter in order to be promoted to lieutenant by September 8,1986: July 14, 1977
Latest firefighter examination candidate could have taken in order to be hired by July 14,1977: 1974 firefighter exam

1989 Battalion Chief Examination #88001 List

Rank(s) eligible to take battalion chief test: Captain
Date by which candidate had to be a captain to be eligible to take the 1989 battalion chief test: March 11, 1989

Latest captain examination candidate could have taken in order to be promoted to captain by March 11,1989: 1987 captain exam
Date by which candidate had to be a lieutenant in order to be promoted to captain by March 11,1989: September 8, 1986
Latest lieutenant examination candidate could have taken in order to be promoted to lieutenant by September 8,1986: 1978 lieutenant exam
Date by which candidate had to be hired as a firefighter in order to be promoted to lieutenant by September 8,1986: August 19, 1977

Latest firefighter examination candidate could have taken in order to be hired by August 19,1977: 1974 firefighter exam

1991 Captain Examination #39104 List

Rank(s) eligible to take captain test: Lieutenant
Date by which candidate had to be a lieutenant to be eligible to take the 1991 captain test: August 23, 1991
Latest lieutenant examination candidate could have taken in order to be promoted to lieutenant by August 23, 1991: 1986 lieutenant exam
Date by which candidate had to be hired as a firefighter in order to be promoted to lieutenant by August 23,1991: September 8, 1985
Latest firefighter examination candidate could have taken in order to be hired by September 8,1985: 1978 firefighter exam

1993 Lieutenant Examination #39202 List

Rank(s) eligible to take lieutenant test: Firefighter, Engineer
Date by which candidate had to be hired as a firefighter to be eligible to take the 1993 lieutenant test: December 31, 1991
Latest firefighter examination candidate could have taken in order to be hired by December 31,1991: 1985 firefighter exam

1994 Engineer Examination #39305 List

Rank(s) eligible to take engineer test: Firefighter
Date by which candidate had to be hired as a firefighter to be eligible to take the 1994 engineer test: September 30, 1992
Latest firefighter examination candidate could have taken in order to be hired by September 30, 1992: 1985 firefighter exam

(DX16-5).

Because of the sequence of exam dates and the CFD requirement of an individual having time in rank for promotion eligibility, remedying past discrimination could only be accomplished within those restrictions by the CFD. Therefore, the past intentional discrimination which ended in the 1980s had a lingering effect on the racial and ethic composition of the CFD especially in the promotional ranks for several years thereafter.

During each of the years 1980 forward through 1992, the percentage of minority representation continued to fall short of what would be expected had the intentional past discrimination not occurred, as the following charts derived from DX 17-27 demonstrate.

FIREFIGHTERS

	African-Americans			Hispanics		
YEARS	Expected%	Actual%	Shortfall%	Expected%	Actual%	Shortfall%
1980	32.97	17.98	14.99	12.10	4.19	7.91
1981	33.02	18.00	15.02	12.20	4.21	7.99
1982	33.23	18.79	14.44	12.53	4.31	8.22
1983	33.36	19.28	14.08	12.78	4.71	8.07
1984	33.43	19.41	14.02	12.94	4.72	8.22
1985	33.62	19.74	13.88	13.26	5.05	8.21
1986	33.85	21.36	12.49	13.91	5.38	8.53
1987	34.10	22.51	11.59	14.60	5.64	8.96
1988	34.42	23.27	11.15	15.46	6.29	9.17
1989	34.51	23.44	11.07	15.91	6.68	9.23
1990	34.51	23.69	10.82	16.45	7.11	9.34
1991	34.59	23.67	10.92	16.84	7.42	9.42
1992	34.70	23.73	10.97	17.15	7.57	9.58

(DX 17-27, E00004 5).

FIRE ENGINEER

	African-Americans			Hispanics		
YEARS	Expected%	Actual%	Shortfall%	Expected%	Actual%	Shortfall%
1980	29.08	7.45	21.63	7.15	1.68	5.47
1981	29.30	8.01	21.29	7.32	1.37	5.95
1982	29.48	8.39	21.09	7.50	1.51	5.99
1983	29.39	8.26	21.13	7.43	1.34	6.09
1984	29.48	8.70	20.78	7.50	1.30	6.20
1985	29.46	8.97	20.49	7.52	1.07	6.45
1986	30.07	9.71	20.36	8.38	1.65	6.73
1987	31.23	11.35	19.88	9.92	1.96	7.96
1988	31.81	11.22	20.59	10.51	2.13	8.38
1989	32.23	11.92	20.31	10.94	2.50	8.44
1990	32.66	12.06	20.60	11.42	2.60	8.82
1991	32.98	12.38	20.60	11.77	3.00	8.77
1992	33.29	12.92	20.37	12.05	3.13	8.92

(DX 17-27, E00042).

LIEUTENANT

	African-Americans			Hispanics		
YEARS	Expected%	Actual%	Shortfall%	Expected%	Actual%	Shortfall%
1980	27.45	4.31	23.14	6.11	1.90	4.21
1981	27.87	5.83	22.04	6.43	2.27	4.16
1982	28.14	6.83	21.31	6.60	2.33	4.27
1983	28.32	7.09	21.23	6.72	2.41	4.31
1984	28.41	7.13	21.28	6.78	2.28	4.50
1985	28.67	8.47	20.20	6.97	2.19	4.78
1986	29.03	9.83	19.20	7.20	2.39	4.81
1987	29.57	10.59	18.98	7.60	2.81	4.79
1988	30.18	11.02	19.16	8.16	2.99	5.17
1989	31.06	11.18	19.88	9.33	3.51	5.82
1990	31.54	10.97	20.57	9.91	3.92	5.99
1991	31.90	11.93	19.97	10.28	4.02	6.26
1992	32.20	12.23	19.97	10.52	4.08	6.44

(DX17-27, E00003 9).

CAPTAIN

	African-Americans			Hispanics		
YEARS	Expected%	Actual%	Shortfall%	Expected%	Actual%	Shortfall%
1980	23.99	4.76	19.23	4.18	1.36	2.82
1981	24.39	4.49	19.90	4.34	1.28	3.06
1982	24.20	4.14	20.06	4.27	1.18	3.09
1983	24.22	4.02	20.02	4.27	1.15	3.12
1984	24.37	3.93	20.44	4.33	1.69	2.64
1985	24.67	3.06	21.61	4.44	1.53	2.91
1986	25.08	1.90	23.18	4.61	1.43	3.18
1987	26.21	4.96	21.25	5.32	1.65	3.67
1988	27.48	7.84	19.64	6.13	2.61	3.52
1989	28.07	9.32	18.75	6.45	2.12	4.33
1990	28.81	9.36	19.45	6.78	2.55	4.23
1991	29.20	9.33	19.87	7.10	3.11	3.94
1992	29.90	10.27	19.63	7.73	3.13	4.60

(DX17-27, E00003 6).

BATTALION CHIEF

	African-Americans			Hispanics		
YEARS	Expected%	Actual%	Shortfall%	Expected%	Actual%	Shortfall%
1980	22.15	3.19	18.96	3.52	1.06	2.46
1981	22.19	2.78	19.41	3.53	1.85	1.68
1982	22.37	1.82	20.55	3.57	1.82	1.75
1983	22.44	1.82	20.62	3.59	1.82	1.77
1984	22.58	3.33	19.25	3.64	1.67	1.97
1985	22.68	3.85	18.83	3.69	1.54	2.15
1986	22.58	4.73	17.85	3.63	1.35	2.28
1987	22.73	4.64	18.09	3.66	1.32	2.34
1988	23.25	2.24	21.01	3.81	1.49	2.32
1989	26.15	3.51	22.64	5.42	1.75	3.67
1990	26.73	5.26	21.47	5.79	1.75	4.04
1991	27.30	6.32	20.98	6.06	1.72	4.34
1992	28.18	7.20	20.98	6.48	1.82	4.66

(DX17-27, E00003 3).

Dr. Suchanek's "Population-Based Expectation" percentages ended with the year 1992. The CFD's promotions and the evidence relating thereto did not. The last promotions at issue here occurred, became effective on March 1, 1997 (Stip. p. 60, ¶ 1 and p. 95, ¶ 1).

There was no evidence of the "Population-Based Expectation" percentages after 1992. Therefore, the court has compared the 1992 "Expectation" percentages listed on DX 17-27 for each CFD promotional rank with the actual data of CFD Uniform Strength Reports by Career Service Rank for the years 1993 through 1996 (DX17-22), as well as with the facts to which parties' stipulated regarding the composition of certain CFD ranks in certain years. Based on those comparisons, it is clear the "shortfall in minority representation," *McNamara*, 138 F.3d at 1224, resulting from the lingering effects of the past intentional discrimination continued to exist at all CFD ranks through at least 1996.

FIREFIGHTERS

African-Americans

YEARS	Expected % (1992)	Actual %	Shortfall %
1993	34.70	23.42 (693/2959) (Stip. p. 90, ¶ 10)	11.27
1994	34.70	25.95 (700/2697) (DX17-22)	8.75
1995	34.70	25.80 (679/2631) (DX17-22)	8.90
1996	34.70	24.31 (660/2714) (DX17-22)	10.38

Hispanics

YEARS	Expected % (1992)	Actual %	Shortfall %
1993	17.15	7.60 (225/2959) (Stip. p. 90, ¶ 10)	9.55
1994	17.15	8.56 (231/2697) (DX17-22)	8.59
1995	17.15	8.77 (231/2631) (DX17-22)	8.38
1996	17.15	9.21 (250/2714) (DX17-22)	7.94

FIRE ENGINEER

African-Americans

YEARS	Expected % (1992)	Actual %	Shortfall %
1993	33.29	13.90 (Stip. p. 92, ¶ 24)	19.39
1994	33.29	13.97 (65/465) (DX17-22)	19.32
1995	33.29	15.89 (76/478) (DX17-22)	17.40
1996	33.29	17.84 (88/493) (DX17-22)	15.45

Hispanics

YEARS	Expected % (1992)	Actual %	Shortfall %
1993	12.05	3.50 (Stip. p. 92, ¶ 24)	8.55
1994	12.05	3.44 (16/465) (DX17-22)	8.61
1995	12.05	3.97 (19/478) (DX17-22)	8.08
1996	12.05	5.07 (25/493) (DX17-22)	6.98

LIEUTENANT

African-Americans

YEARS	Expected % (1992)	Actual %	Shortfall %
1993	32.20	13.22 (84/635) (DX17-22)	18.98
1994	32.20	14.13 (90/637) (DX17-22)	17.90
1995	32.20	15.08 (92/610) (DX17-22)	17.12
1996	32.20	15.35 (95/619) (DX17-22)	16.85

Hispanics

YEARS	Expected % (1992)	Actual %	Shortfall %
1993	10.52	4.72 (30/635) (DX17-22)	5.80
1994	10.52	5.02 (32/637) (DX17-22)	5.50
1995	10.52	5.41 (33/610) (DX17-22)	5.11
1996	10.52	5.82 (36/619) (DX17-22)	4.70

CAPTAIN

African-Americans

YEARS	Expected % (1992)	Actual %	Shortfall %
1993	29.90	12.37 (25/202) (DX17-22)	17.53
1994	29.90	12.89 (25/194) (DX17-22)	17.01
1995	29.90	15.17 (27/178) (DX17-22)	14.73
1996	29.90	16.30 (30/184) (DX17-22)	13.60

Hispanics

YEARS	Expected % (1992)	Actual %	Shortfall %
1993	7.73	3.46 (7/202) (DX17-22)	4.27
1994	7.73	3.61 (7/194) (DX17-22)	4.12
1995	7.73	4.49 (8/178) (DX17-22)	3.24
1996	7.73	4.89 (9/184) (DX17-22)	2.84

BATTALION CHIEF

African-Americans

YEARS	Expected % (1992)	Actual %	Shortfall %
1993	28.18	8.75 (14/160) (DX17-22)	19.43
1994	28.18	9.15 (14/153) (DX17-22)	19.03
1995	28.18	7.59 (12/158) (DX17-22)	20.59
1996	28.18	8.18 (13/159) (DX17-22)	20.00

Hispanics

YEARS	Expected % (1992)	Actual %	Shortfall %
1993	6.48	3.13 (5/160) (DX17-22)	3.35
1994	6.48	3.27 (5/153) (DX17-22)	3.21
1995	6.48	3.16 (5/158) (DX17-22)	3.32
1996	6.48	3.14 (5/159) (DX17-22)	3.34

NARROWLY TAILORED REMEDIATION

The analysis of this issue has to begin with the determination of whether the City had alternatives in attempting to remedy the intentional past discrimination other than to engage in the consideration of race and ethnicity in making the disputed promotions in the CFD. Under the collective bargaining agreement between the City and Local 2, promotions in the CFD had to be made based on lists derived from examinations that consisted of a written component, an oral/proficiency component, and seniority. The promotions themselves had to be made in strict rank order of those seeking promotions who achieved passing grades. The only exception to the strict rank order requirement was when the purpose of the non-rank order promotions was affirmative action. As stated earlier, the promotion to the promotional ranks of fire engineer, fire lieutenant, fire captain, and battalion chief could only come from personnel holding the rank below when vacancies in the upper ranks occurred. To enable the City to create more upper rank vacancies by offering CFD personnel incentives to leave the CFD, such as early retirement, legislative enactment

was required. The City chose not to pursue this alternative for two reasons: (1) Local 2's assent, which as a practical matter was required to obtain the necessary legislative action, was never offered, and (2) early retirement would only hasten the availability of upper rank positions which would have then gone to non-minorities who were disproportionately represented in the CFD's lower ranks because of the intentional past discrimination. Thus, the "early retirement" alternative would not have remedied the effects of the past intentional discrimination.

Other than to engage in minority recruitment for the firefighter rank, which the City did, and to provide pre-examination materials to all individuals who proposed to take a promotional exam, which the City also did, the only reasonable and realistic alternative the City had available to it to remedy the past intentional discrimination in the CFD was to make limited, non-rank order promotions pursuant to a policy of affirmation action. Consequently, after the results of each promotional exam at issue were evaluated and rank order lists were prepared based strictly on examination scores, the procedure followed by the City was that the City's Personnel Department carefully considered the circumstances bearing on the compelling need for, and the narrow tailoring of, an affirmative action plan of non-rank order promotions to be made from each exam's resulting rank order fist.

In each instance, the City's Commissioner of Personnel, after consultation with the City's Corporation Counsel, explained the recommended affirmative action plan and the considerations for that plan in a letter t o the Commissioner of the CFD. The letters, which preceded the respective promotional decisions made by the CFD, were each a credible assessment of the need for the affirmative action plan recommended after the results of each exam were analyzed, are as follows: DX1-3, 1985 engineer exam #40001; DX2-1, 1987 fire captain exam #68737; DX3-1, 1989

battalion chief exam #88001; DX4-1, 1991 fire captain exam #39104; DX5-2, 1993 lieutenant exam #39202; DX6-2, 1994 engineer exam #39305. None of these letters was pretextual as plaintiffs' counsel has argued. Each appropriately and adequately supported the affirmative action plan implemented by the CFD.

Additionally, in implementing its affirmative action policies in the 1980s, the CFD adhered to a procedure, with which Local 2 agreed, that no more than 25 percent of the total promotions made in any CFD promotional order would be affirmative action, non-rank order promotions. In the City's affirmative action policies commencing in 1992, the City adopted an approach referred as the "20% over rule" which limited the affirmative action, non-rank order promotions to no more than 20 percent over the minority representation in the rank below from which those promotions were being made.

After examining each challenged affirmative action plan in these consolidated cases, and the implementation of each, the court finds that the promotion of minorities to the promotional ranks of the CFD pursuant to each affirmative action plan was "a plausible lower-bound estimate of the shortfall in minority representation" *McNamara*, 138 F.3d at 1224, among the CFD promotional ranks that was due to the CFD's intentional discrimination in the past. It should be emphasized also that every person promoted by the CFD, whether in strict rank order or by affirmative action, was qualified for the position. In fact, the evidence is undisputed that the CFD unproved in its ability to protect the people and property of Chicago during the period of the promotions in dispute here. (CFFU Tr. at 112-13).

1985 Fire Engineer Exam Promotions

Before the affirmative action plan was implemented regarding the list of persons eligible for promotion as a result

of the 1985 fire engineer exam #40001, the City recognized and stated in a June 16, 1987 letter from the City's Commissioner of Personnel Jesse E. Hoskins to the CFD's Commissioner Louis Galante, in part, as follows:

> Although we have been working in recent years to overcome the effects of past discrimination, those effects are still clearly present. Based on 1980 census workforce availability figures, one would expect Blacks and Hispanics to comprise approximately 35% and 10%, respectively, of each rank in the promotional sequence. The actual utilization figures demonstrate a severe under utilization:

	Blacks	Hispanic
External Availability	approx. 35%	approx. 10%
Firefighters	23.20%	5.70%
Engineers	9.57%	1.51%
Lieutenants	10.4%	3.1%
Captains	2.10%	1.03%
Battalion Chiefs	1.01%	1.01%

> The unfortunate reason for this underutilization is past discrimination by the City. Prior to the late 1970's, there was only minimal hiring of Blacks and Hispanics as Firefighters. The discrimination in hiring has had its predictable effect on minority access to higher level positions such as Engineer. This problem was exacerbated by the past use of discriminatory promotion tests, *i.e.*, invalidated tests which had an adverse impact on minorities. These practices led the United States Department of Justice to bring suit against the City, which produced the consent decrees under which we now operate.
>
> Unfortunately, the effects of this past discrimination cannot be speedily overcome. The past several years of court-ordered affirmative action have brought some improvement, but dramatically more improvement is

needed to correct the effects of such a long history of discrimination. Further affirmative action is therefore necessary.

(DX1-3, p. 2).

The June 16, 1987 letter credibly demonstrated that the City had considered other possible alternatives, and by implementing the recommended promotion procedures and promotion ratios, the City was attempting, as a practical matter, to discriminate against whites as little as possible consistent with effective remediation. The June 16, 1987 letter also stated in part:

> In determining that promotion ratios of 20% Black and 5 % Hispanic should be used in making promotions to the rank of Engineer, a number of important considerations were taken into account. First, we selected a system of promotion ratios only after concluding that no other approach would permit meaningful affirmative action progress. Both by contract and as a result of the Department's operating needs, promotions to the rank of Engineer must be made from the rank of Firefighter, and by contract we must customarily promote in rank order. Thus this clearly is not a situation where a race-neutral approach such as aggressive outside recruitment could be used to achieve affirmative action goals.
>
> Second, we considered the impact that these ratios would have on the promotional opportunities of other candidates on the Engineer Eligible List. In view of the current severe underutilization at the rank of Engineer, an argument could be made for the temporary use of a 50% minority promotion ratio. Although we considered selecting a 50% ratio, the lower goals of 20% Black and 5% Hispanic were chosen in order to ensure that our affirmative action efforts do not unduly burden other candidates for promotion.

(DX1-3, p. 3).

Before implementing the affirmative action plan stated in the June 15, 1987 letter, the City made the first 83 promotions, which were effective on June 16, 1986 and January 16, 1987, in strict rank order. Of those 83, nineteen went to minorities, fifteen to blacks (18%) and four to Hispanics (4.8%).

When the affirmative action plan was implemented, starting with the promotions effective August 16, 1987 in Personnel Order 87-017 (Stip. p. 14, ¶ 27), the City made 56 additional promotions from the 1985 fire engineer exam #40001 list. The first 48 of those 56 were in strict rank order, and among those 48 strict rank order promotions were 6 blacks and 3 Hispanics. (JX A-21). Only the last 8 persons promoted of the 56 were affirmative action promotions. These non-rank order promotions were of 8 African Americans.

Thereafter, the City made 223 more promotions to fire engineer from the list. Among these 223, were 50 non-rank order promotions, 37 blacks (16.6%) and 13 Hispanics (5.8%). (Stip. p.14, ¶ 28). A total of 362 promotions were made, but the last 23 promotions effective January 1, 1993 were made pursuant to what the parties have termed the "wrap around" agreement between the City and the Department of Justice, (DXI-4; CFFU Tr. 101-02), which provided that any non-minority who was not promoted as a result of affirmative action would be promoted before the promotional list was retired. But for the affirmative action policy implemented by the City regarding the promotions resulting from the 1985 fire engineer exam, these 23 promotions, 21 whites, 1 black and 1 Hispanic, would not have occurred. Had the preceding 339 (362 minus 23) occurred in strict rank order, the last person promoted would have been rank #398 because 59 people, for one reason or another unrelated to this litigation, were not promoted. (Joyce Dr. at 94).

Applying the framework of the analysis set out in *McNamara*, 138 F.3 d at 1224, for evaluating the question of justifying on remedial grounds the application of a plan for affirmative action to the results of the 1985 fire engineer examination promotions, this court finds that the City has convincingly met its burden that its affirmation action plan as to the promotions was not violative of the Constitution. Had the first 339 promotions been made in strict order of rank, rather than just the first 131 promotions, 58 of the fire engineers promoted would have been black (17.1%, 58/339) and 15 would have been Hispanic (4.4%, 15/339). The affirmative action plan called for increasing the fraction of minority firefighters promoted to fire engineer to 20 percent black and 5 percent Hispanic, but for doing so with minimum adverse impact on whites. To this end, the CFD made 23 additional promotions (10 white, 8 black, 5 Hispanics) for a total of 362. Of the 362 promotions, 66 (18.23%, 66/362) were of black firefighters and 20 (5.5%, 20/362) were of Hispanic firefighters. Because there were so few black and Hispanic fire engineers before the new promotions, these promotions, though slanted in favor of the minority firefighters, did not bring the racial and ethnic composition of the fire engineer rank to what it would have been had the CFD not engaged in intentional discrimination in the past.

After the completion of the promotions during 1993, the CFD had 508 fire engineers. The percentage of black fire engineers was 13.9 percent (Stip. p. 92, ¶ 29) and the percentage of Hispanic fire engineers was 3.5 percent. *Id.* Had it not been for the affirmative action plan, these percentages would have been 12.2 percent (62/508) for blacks and 2.55 percent (13/508) for Hispanics in a city with a population of "more than half black and Hispanic." *McNamara*,138 F.3d at 1224.

The increase in the number (as distinct from percentage) of black fire engineers over what it would have been without the

affirmative action plan was eight and of Hispanic five. The test is whether this increase is a plausible lower-bound estimate of a short fall in minority representation among fire engineers that is due to the CFD's intentional discrimination in the past. *McNamara*, 138 F.3d at 1224. The evidence shows it clearly is. The result of the affirmative action plan was to boost in 1993 the total minority proportion of fire engineers to 17.32% (88/508), which was still far below the 1992 expected minority proportion in the fire engineer rank of 45.34% (DX 17-27) and far below the rank of firefighter in the CFD, which had a 31% minority composition in 1993. (Stip. p. 90, ¶ 10).

The vast majority of white candidates were unaffected by the City's plan as implemented. No white candidate for fire engineer, who otherwise would have been promoted but for the City's plan, was denied a promotion. The effect of the City's affirmative action plan as to these fire engineer promotions was to delay certain white candidates promotions and cause them harm which was only "temporary." *McNamara*, 138 F.3d at 1221. The average delay of those plaintiffs, with standing and who did not waive promotion, was less than six months. Moreover, of the 362 total promotions made before the 1985 fire engineer exam promotional list was retired, there were only 13 affirmative action promotions of minorities (8 blacks and 5 Hispanics) that would not otherwise have occurred had the promotions from the list followed strict rank order. Overall, the racial composition of the 508 individuals holding the CFD rank of fire engineer as of 1993 was changed by 2.56% (13/508). As a practical matter, the City's plan discriminated against whites as little as possible consistent with effective remediation. The plan was narrowly tailored and did not violate the Constitution.

1987 Fire Captain Examination #68737

Turning to the claim of plaintiff James Fisher, the only plaintiff in these consolidated cases to challenge the constitutionality of the minority promotions to the rank of fire captain between October 16, 1987 and April 1, 1992. James Fisher's promotion to fire captain was delayed six and one half months from October 16, 1987 to May 1, 1988 because the City had determined that affirmative action was necessary, and on October 16, 1987 promoted Fire Lieutenant Baustista, the top ranking Hispanic fire lieutenant eligible for promotion. Baustista was the first person promoted to the rank of fire captain in non-rank order of the 24 affirmative action, non-rank order promotions that were made as a result of the 1987 fire captain exam. Of those 24 affirmative action promotions, 16 promotions went to black fire lieutenants and 8 went to Hispanic fire lieutenants.

Applying the framework analysis set out by the Seventh Circuit in *McNamara* for evaluating the question of justifying on remedial grounds the application of a plan for affirmative action to the results of the 1987 captain examination, this court finds, as did the Seventh Circuit in *McNamara*, 138 F.3d at 1224, that had the promotions been made in strict order of rank on the exam, 20 of the 143 lieutenants promoted would have been black (14%) and five of the lieutenants promoted would have been Hispanic (3.5%). The affirmative action plan called for increasing the fraction of minority lieutenants promoted to captain to 20 percent black and 5 percent Hispanic, but for doing so with minimum adverse impact on whites. To this end, the CFD made the 18 additional promotions for a total of 161. Of the 161 total promotions, 31 promotions were of black lieutenants and 9 were of Hispanic. Because there were so few black and Hispanic captains before the new promotions, these promotions, though slanted in favor of the minority lieutenants, did not bring the racial and ethnic composition of

the fire captain rank into conformity with the racial and ethnic composition of either the City's population or the CFD as a whole. *Id.*

In 1992, immediately after the completion of the promotions, according to Seventh Circuit's review of the record in *McNamara*, the percentage of black captains was 10.8 percent and the percentage of Hispanic was 3.6 percent. *Id.* Had it not been for the affirmative action plan, these percentages would have been 5.7 percent and 1.7 percent in a city the population of which is more than half black or Hispanic. *Id.*

The increase in the number (as distinct from percentage) of black captains over what it would have been without the affirmative action plan was 11, and of Hispanic 4. Applying the appropriate test, this court believes that this increase in minority fire lieutenants promoted to fire captain was a plausible lower-bound estimate of a short fall in minority representation among fire captains that is due to the CFD's intentional discrimination in the past.

The result of this affirmative action plan was to boost the minority proportion of CFD captains to 14.4%, which was still far below the 1992 expected minority proportion of 37.63% (DX17-27), below the lowest rank in the CFD of firefighter, which was 31% minority (Stip. p. 90, ¶ 10), and below the 1993 minority proportion of the CFD lieutenant rank of 17.95% (DX17-22), the rank from which CFD captains were promoted.

Additionally, the Seventh Circuit considered the *McNamara* plaintiffs' delays in promotion to captain of one year to be "temporary." *Id.* at 1221. Plaintiff Fisher's delay in his promotion to captain of six and one half months also should be considered temporary. Consequently, this court finds that the City's affirmative action plan for promotions from the 1987 captain's exam was narrowly tailored and did not

violate plaintiff Fisher's right to equal protection under the Fourteenth Amendment.

1989 Battalion Chief Exam

The 1989 battalion chief exam #88001 was the first battalion chief exam given after the City had entered into the 1980 consent decree pursuant to the *Albrecht settlement.* (Joyce Dr. at 124). After that exam, when the resulting list of captains eligible for promotion to battalion chief was analyzed, the City realized that under the 80% rule of the EEOC Guidelines, there was adverse impact against minorities until rank 90, (Stip. p. 33, ¶ 16), and not until rank #75 was there compliance with the long range goal of the *Albrecht* settlement. (Joyce Dr. at 128).

The rank order eligible list for promotions to fire battalion chief from exam #88001 became official in July 1989. Two letters were ultimately sent from the City's Commissioner of Personnel Glenn E. Carr to Fire Commissioner Raymond Orozco credibly stating the reasons why the city needed to use affirmation action for promotions to the rank of battalion chief from the eligible list. The first letter was dated on July 26, 1989, (DX3-1), and the second letter was dated on July 14, 1992. (DX4-1). The second letter dated July 14, 1992 stated in pertinent part that:

> Although the situation in the Fire Department has improved somewhat in recent years, affirmative action in both the Captain and Battalion Chief ranks is still warranted. The effects of past discrimination in fire department hiring and promotions are still visibly present in those ranks. As the following chart shows, over 90% of those currently holding the position of Battalion Chief are white. Of the 193 current Captains, less than 15% are African-American or Hispanic.

Current Fire Department Composition

	White	Black	Hispanic
Battalion Chief T = 105	97 (92.4%)	7 (6.7%)	1 (.9%)
Captain T = 193	165 (85.5)	21 (10.9)	7 (3.6)
Lieutenant T = 606	504 (83.2)	75 (12.4)	25 (4.1)
Firefighter T = 2699	1772 (65.6)	679 (25.1)	219 (8.1)
Total Uniform Personnel	3513 (73.1)	931 (19.4)	319 (6.6)

> Thus, despite the City's attempts to comply with the 1980 consent decree and its other efforts in recent years to eradicate the effects of discrimination from the ranks of the Fire Department, those efforts have not yet been fully successful. The racial and ethnic composition of the upper ranks simply would not look like this if there had been no prior discrimination in hiring and promotion. Since the department continues to reflect the effects of that past discrimination, remedial action is still both justified and necessary.

(DX4-1, pp. 1-2).

For these reasons, Commissioner Carr continued in his July 14, 1992 letter:

> Thus, we believe that affirmative action in promotions to the two top career service ranks in the Fire Department is warranted. Our proposal that promotions to Captain and Battalion Chief include African-Americans and Hispanics at a ratio 20% over their percentage representation in the respective eligible ranks (*i.e.*, at 120%, or 1.2, times that percentage). . . .

Id.

Effective August 1, 1989 under Personnel Order 89-011, the CFD made 50 strict rank order promotions to fire battalion chief. (JX C-15). Of those first 50 promotions, whites received 47, blacks received 3, Hispanics received none. Pursuant to the City's affirmation action plan, 4 non-rank order promotions were also made, blacks received 2 and Hispanics received 2. (Stip. p. 34, ¶ 22A). Promotions were made periodically thereafter, including 12 more non-rank order promotions as set forth in the uncontested facts. (Stip. pp. 34-3 5, ¶ 24). The last promotions made from the eligible list resulting from the 1989 battalion chief exam #88001 were effective on January 1, 1995. In total there were 107 promotions, 88 (87.24%) went to whites, 15 (14.01%) went to blacks and 4 (3.74%) went to Hispanics.

Applying the framework analysis set out in *McNamara*, 138 F.3d at 1224, for evaluating the question of justifying on remedial grounds the application of a plan for affirmative action to the results of the battalion chief exam #88001 promotion, this court finds that the City has convincingly met its burden based on the evidence presented at trial. Had the promotions been made in strict order of rank on the exam and the first 107 persons named on the list been promoted, of the 107 captains promoted, 12 would have been black (11.21%, 12/107) and three would have been Hispanic (2.80%, 31107). The affirmative action plan called for increasing the fraction of minority captains promoted to battalion chief to 20 percent black and 5 percent Hispanic, but for doing so with minimum adverse impact on whites. The City made four promotions beyond the first 107 persons ranked on the list who accepted promotion. (See DX3-4). Dr. Suchanek described these four promotions as "net non-rank order promotions." (CFFU Tr. at 2016-17). Because there were so few black and Hispanic battalion chiefs before the promotions, these promotions, though slanted in favor of the minority captains, did not bring the racial and ethnic composition of the fire battalion chief

rank into conformity with the racial and ethnic composition expected as of 1992 (DX17-27), the CFD fire captain rank at the end of 1994, or the CFD as a whole in 1995 after the battalion chief promotions from the 1989 battalion exam #88001 list ended.

According to the CFD's Uniform Strength Reports (DX17-22), as of December 31, 1994, one day shy of January 1, 1995, the day the last black captain Garland Boston was promoted to battalion chief from the 1989 fire battalion chief exam #88001 eligible list, (Stip. p. 35, ¶ 22J), there were 153 battalion chiefs in the CFD. Of those 153, there were 14 (9.15%) African-Americans and 5 (3.27%) Hispanics. The stipulation referring to Personal Order 94-024 promoting Garland Boston to battalion chief is in evidence (Stip. p. 35, ¶ 22J). It was also stipulated by the parties that plaintiffs Lambert, Flood as and Peck were promoted as well on January 1, 1995. (Stip. pp. 37-39, ¶¶ 29-31). Considering those stipulated promotions and the two additional white captains (John McNamara and Ted Korlos) (JX C-15; DX3-4) promoted to battalion chief effective January 1, 1995, there were 159 CFD battalion chiefs on January 1, 1995. Consequently, the racial and ethnic composition of the CFD's battalion chief rank on January 1, 1995 was: white 87.42% (139/159); black 9.43% (15/159); and Hispanic 3.14% (51/59). These percentages were still a distance from the goal of 20% black and 5% Hispanic as stated in the letter dated on July 14, 1992, (DX4-1), and still far below the expected representation in 1992 of 28.18% black and 6.48% Hispanic as opined by Dr. Suchanek. (DX17-27). Discounting the 1992 expectation by 28%, as argued by the plaintiffs, to account for the "sustainable hire rate," the minority expectation percentage for the battalion chief rank in 1992 was 24.93% (20.28% African-American and 4.66% Hispanics). The black and Hispanic proportion in the battalion chief rank of 12.57% (20/159) reached on January 1,1995 was slightly over one half of the lowest

expected percentage. It also was still below the minority proportion in the CFD captain rank of 16.5% (32/194) at the end of 1994 (DX17-22), and well below the minority proportion of the CFD as a whole which was 27.73% (1315/4742) as of December 31, 1994, and 28.48% (1330/4670) as of December 31, 1995. (DX17-22). Clearly, the City, as a practical matter, carefully minimized the adverse impact on whites consistent with effective remediation. The average delay of the plaintiffs who were promoted was slightly over twelve months. The City's plan was narrowly tailored consistent with effective remediation and did not violate the Constitution.

1991 Fire Captain Examination #39104

As was mentioned earlier, the City's Commissioner of Personnel Glenn E. Carr on July 14, 1992 appropriately and credibly set forth the City's reasons for the recommended affirmative action plan to continue to remedy the lingering effects of the past intentional discrimination in a letter to the CFD Commissioner Raymond Orozco. (DX4-1) (quoted in part above regarding the promotions resulting from the 1989 battalion chief exam). With regard to the promotions made from the 1991 fire captain exam #39104 eligible list, the parties stipulated, among other things, as follows:

> 24. Between July 16, 1992 and March 1, 1997, there were eight (8) personnel orders issued by the CFD, making 117 promotions to fire captain from the fire captain promotional eligibility list #39104. Of these 117 promotions to fire captain from fire captain eligibility list #39104, 18 promotions were made on a non-rank order basis and claimed by the City to be justified for reasons articulated in Commissioner Carr's July 14, 1992 letter to then Commissioner Orozco [DX4-I]. Of these 18 affirmative action, non-rank order promotions, 12 promotions went to black fire lieutenants and six (6) to Hispanic fire lieutenants. . . .

> 26. A total of 109 promotions to fire captain were offered and accepted between July 16, 1992 and January 1, 1997 from the eligible list [JX D-15] based on fire captain promotional examination #39104. Of those 109 promotions, 85 [77.98%] went to whites, 18 [16.51%] went to blacks and five (5) [4.59%] went to Hispanics.

(Stip. p. 45, ¶ 24; p. 46,¶ 26).

According to the parties stipulations, Personnel Order 96-008, effective March 1, 1997, promoted eight CFD fire lieutenants to fire captain: 6 whites, 1 black, and 1 Hispanic. Of the 117 total promotions to fire captain as of March 1, 1997, whites received 91 (77.78%), blacks received 19 (16.24%), and Hispanics received 6 (5.12%).

Applying the framework analysis set out in *McNamara*,138 F. 3d at 1224, for evaluating the question of justifying on remedial grounds the application of a plan for affirmative action to the fire captain promotions from the results of the 1991 fire captain exam #39108 as of March 1997, the court finds that the City has convincingly met its burden. As of March 1997, of the 18 stipulated affirmative action promotions, (Stip. p. 45, ¶ 24), 10 had only the effect of accelerating the promotions of the minority candidates promoted. (CFFU Tr. at 2014-16). These 10 minority candidates would have been promoted on or before March 1997 had the CFD used strict rank order for the promotions. Looking at the stipulations (Stip. pp. 45-6, ¶ 24) and the eligible promotional list, (JX B-11), these 10 accelerated, affirmative action promotions were of 6 blacks and 4 Hispanics. There was also 1 Hispanic (rank #12) fire lieutenant promoted to fire captain in strict rank order without the accelerating effect of affirmative action. Therefore, had all 117 promotions been made in strict order of rank, 11 minority lieutenants would have been promoted, 6 African-Americans and 5 Hispanics. The affirmative action

plan stated that the promotions from the eligible list were to be made at a ratio of 20% over the black and Hispanic composition of the fire lieutenant rank to minimize the adverse impact on whites. (DX4-1, p. 2). As a result, the CFD made 8 minority promotions outside of what the CFD would have made had there been adherence to strict rank order in reaching the 117 total. (CFFU Tr. at 2014-16). Of those 8 net affirmative action promotions, 6 were to blacks and 2 were to Hispanics. Because there was so few black and Hispanic fire captains before the new promotions, these promotions, though slanted in favor of the minority lieutenants, did not bring the racial and ethnic composition of the fire captain rank into conformity with the racial and ethnic composition expected for the year 1992 or the CFD as a whole as of December 31, 1996. (DX 17-22).

Adding the 11 promotions, which the parties stipulated occurred in 1997, to the 184 fire captains enumerated on the December 31, 1996 Uniform Strength Reports, (DX17-22), there were according to this evidence,[6] a total of 195 fire captains in the CFD as of March 1, 1997. Of those 195 fire captains there were 151(77.4%) whites, 33 (17%) blacks, and 11 (5.6%) Hispanics. Therefore, there was a total minority percentage in the captain rank of 22.6% according to the evidence. The increase in the number (as distinct from percentage) of black fire captains over what it would have been without the affirmative action plan was 6 and of Hispanic 2, as of March 1997. (CFFU Tr. at 2014-16).

The test is whether this increase of these eight minority fire captains, which increased the minority percentage of the total rank of fire captain as of March 1997 by 4.10% (8/195), is a

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[6] The parties also put in evidence JX H-15, the promotional orders at issue. The court, however, could not discern the race or ethnicity of the people listed on JX H-15, so the court just considered the facts to which the parties stipulated or were otherwise clearly shown.

plausible lower-bound estimate of a short fall in minority representation among fire captains that was due to the CFD's intentional discrimination in the past. This court finds it is. The expected percentage as of 1992 for the rank of fire captain calculated by Dr. Suchanek was 29.9% for blacks and 7.73% for Hispanics, a total minority percentage of 37.63%. (DX 17-27). Even reducing the 1992 expected percentage by the 28% factor to account for the sustainable hire rate, the expected percentages were 21.5% for blacks and 5.56% for Hispanics, a total minority expected percentage of 27% as of 1992. The result of the affirmative action plan, according to the evidence the court considered, was to boost the total minority proportion of the CFD fire captain rank to 22.6% as of March 1997. This 22.6%, as stated earlier, was below the discounted expected percentage for 1992 of 27%, below the minority proportion of CFD as a whole of 28.54% (1368/4792) as of December 3 and below the minority proportion of the lowest rank in the CFD, the firefighter rank of 33.5% (910/2714) as of December 31, 1996. (DX 17-22). Moreover, the vast majority of white candidates for promotion suffered no adverse impact. No plaintiff was denied a promotion to the rank of fire captain and the average delay in the promotions of the ten plaintiffs was less than 10 months. The City's affirmative action plan narrowly tailored and was not violative of the Constitution.

1993 Fire Lieutenant Exam # 39202

As it had done before, the City credibly and appropriately set out its affirmative action plan and the reasons for it in a letter dated December 6, 1993 from Personnel Commissioner Glenn E. Carr to Fire Commissioner Raymond Orozco. (DX5-2). As for the promotions that took place under the plan, the parties stipulated, among other things, as follows:

> 26. Between August 16, 1993, and January 1, 1997, there were nine (9) personnel orders issued by the CFD,

> making 251 promotions to fire lieutenant from fire lieutenant promotional eligible list #39202. Of these 251 promotions to fire lieutenant 55 promotions were made on a non-rank order basis and claimed by the City to be justified for reasons articulated in the December 6, 1993 letter from Commissioner Carr to Commissioner Orozco. Of these 55 affirmative action, non-rank order promotions, 38 promotions went to blacks and 17 to Hispanics. . . .

(Stip. p. 58, ¶ 26).

The parties also stipulated that in Personnel Order 97-008, effective March 1, 1997, there were four more affirmative action promotions, 3 blacks and 1 Hispanic. (Stip. p. 60, ¶ 26 I). The stipulated facts and other clear evidence demonstrated there were 268 total promotions to the lieutenant rank as of March 1, 1997. (CFFU Tr. at 2017). Consequently, it is clear from the parties' stipulations that the March 1, 1997 promotions to fire lieutenant also included 13 whites. Of the 268 total promotions, (CFFU Tr. at 2017), blacks received 42 (15.67 %), Hispanics received 19 (7.08%), and whites and others [7] received 207 (77.2 %).

Applying the framework analysis set out in *McNamara*, 138 F.3d at 1224, for evaluating the question of justifying on remedial grounds the application of the City's plan for affirmative action to the results of the 1993 fire lieutenant examination, this court finds that the City has convincingly met its burden. Had the 268 promotions been made in strict order, of rank of the CFD personnel promoted to fire lieutenant, 14 (5.2%) would have been black and 5 (1.86%) would have been Hispanic. In addition to these 19 minorities who received affirmative action promotions, but would have

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[7] On JX E-7, the rank order list of eligible candidates, there are additional designations beyond those for blacks, Hispanics, and whites such as "AI" and "AA."

also been promoted had strict order of rank been used, there was 1 black (rank #14) and 1 Hispanic (rank #33) who were promoted to fire lieutenant without affirmative action. The affirmative action plan stated that promotions be made at a ratio of 20% over the black and Hispanic composition of the ranks (of firefighter and fire engineer) eligible for promotion to fire lieutenant. Also, the City's plan called for minimizing adverse impact on whites. To this end, the CFD made 43 non-rank order minority promotions, (CFFU Tr. at 2017), beyond those that were or would have been made had there been adherence to strict rank order, to reach the total of 268. Of those 43 net affirmative action promotions, blacks received 28 and Hispanics received 15. (JX E-7). Because there were so few black and Hispanic lieutenants before the new promotions, these promotions, though slanted in favor of minorities, did not bring the racial and ethnic composition of the fire lieutenant rank into conformity with the racial and ethnic composition expected for 1992 (DX17-27), or the CFD as a whole as of December 31, 1996. (DX17-22).

The parties stipulated that:

> During the years 1992 and 1993 the number of uniformed members of the CFD holding the rank of firefighter ranged between 3032 and 2959, respectively; among these firefighters, 69.5% to 68.9% (between 2107 to 2041) were white, 23.1 % to 23.4% (between 702 and 693) were black, and 7.3% to 7.6% (between 223 and 225) were Hispanic. During the years 1992 and 1993 the number of uniformed members of the CFD holding the rank of fire engineer ranged between 502 and 508, respectively; among these fire engineers 82.6% to 82.4% (between 415 to 419) were white, 13.9% (between 70 and 71) were black, and 3.3% to 3.5% (between 17 and 18) were Hispanic.

(Stip. p. 55, ¶11). Taking an average of the 1993 firefighter and fire engineer stipulated percentages and adding 20% of

that average to it, the plan called for approximately 22% of the promotions to go to blacks and approximately 13% of the promotions to go to Hispanics. Only 15.67% (42/268) of the promotions went to blacks and 7.08% (19/268) went to Hispanics. (Stip. p. 58, ¶ 26; Stip. p. 60, P 26 I).

After the completion of the promotions on March 1, 1997, (adding the stipulated 1997 promotions to the December 31, 1996 CFD Uniform Strength Reports (DX17-22) figures for the rank of lieutenant), according to the evidence considered, the percentage of black fire lieutenants was 15.5% (98/632) and the percentage of Hispanic lieutenants was 6.17% (39/632) as of March 1, 1997. Had it not been for the affirmative action plan, the CFD would have had 28 fewer black fire lieutenants and 15 fewer Hispanic fire lieutenants as of March 1, 1997. (CFFU Tr. at 2017).

The test is whether this increase of minority representation in the rank of fire lieutenant is a plausible lower-bound estimate of a short fall in minority representation amount fire lieutenants that was due to the CFD's intentional discrimination in the past. This court finds it is. The result of the affirmative action plan, according to the evidence considered, was to boost the minority proportion of the fire lieutenant rank to 21.67%, which as stated earlier, was still far below the minority proportion of the firefighter rank in the CFD which, as of December 31, 1996, was 33.52% (910/2714). (DX17-22). The 21.67% minority proportion of the fire lieutenant rank was also below the overall CFD uniform rank minority proportion of 28.5% (1368/4792) and below the expected minority percentage as of the end of 1992 in the rank of fire lieutenant, had the past intentional discrimination not occurred, of 42.72% (32.2% black and 10.52% Hispanic). (DX17-27). Even discounting the 1992 expected percentage by 28% for the sustainable hire rate, the lowest expected total minority percentage in the lieutenant rank as of 1992 was 30.65% (23.18% blacks and 7.57% Hispanics). Although the

final percentages cannot be determined until all promotions have been made from the 1993 fire lieutenant exam #39202, the facts are clear the vast majority of the white candidates for promotion suffered no adverse impact. No plaintiff was denied a promotion to fire lieutenant, and the average delay in plaintiffs' promotions was less than seven months. Any adverse impact on whites was, as a practical matter, properly minimized. The City's affirmative action plan was narrowly tailored and did not violate the Constitution.

1994 Fire Engineer Examination # 39305

As the City had done before, prior to any promotions commencing in December 1994, the City credibly set forth its affirmative action plan and the reasons for it in a letter dated December 1, 1994 from the City's Personnel Commissioner Glenn E. Carr to Fire Commissioner Raymond Orozco. (DX6-2). Regarding the letter, the parties stipulated:

> In a December 1, 1994 letter, Commissioner of Personnel Glean E. Carr recommended to then Fire Commissioner Raymond E. Orozco that promotions from fire engineer promotional examination #39202 be made on an affirmative action basis. Commissioner Carr proposed that promotions be made at a ratio of 20% over the black and Hispanic composition of the rank (firefighter) eligible for promotion to fire engineer.

(Stip. p. 93, ¶ 25). As to the promotions made through March 1997, the parties stipulated to, among other things, as follows:

> Between December 16, 1994 and January 1, 1997, there were nine (9) personnel orders issued by the CFD, making 151 promotions to fire engineer from fire engineer promotional eligibility list #39305. Of these 151 promotions to fire engineer from the fire engineer promotional eligibility list #39305, 53 were made on a rank-order basis and claimed by the City to be justified

> for reasons articulated in the December 1, 1994 letter from Commissioner Carr to Commissioner Orozco. Of these 53 affirmative action, non-rank order promotions, 41 promotions went to blacks and 12 to Hispanics . . .

(Stip. p. 93, ¶ 27).

51. A total of 168 promotions to fire engineer were made and accepted to date [March 1997] from the eligible list based on fire engineer promotional examination #39305. Of those 168 promotions, 105 [62.5%] went to whites, 46 [27.38%] went to blacks and 17 [10.11%] went to Hispanics.

(Stip. p. 107, ¶ 51).

Applying the framework analysis set out in *McNamara*, 138 F.3d at 1224, for evaluating the question of justifying on remedial grounds the application of a plan for affirmative action to the promotions as of March 1, 1997 from the 1994 fire engineer examination, this court finds that the City has convincingly met its burden. Had the promotions been made in strict order of rank on the eligible list, of the 168 firefighters promoted, blacks would have received 20 (11.9%) of the promotions and Hispanics would have received 7 (4.16%). The affirmative action plan stated that minority promotions were to be made at a ratio of 20% over the black and Hispanic composition of the rank (firefighter) eligible for promotion to fire engineer, (Stip. p. 93, 125), and called for doing so with minimum adverse impact on whites. The CFD Uniform Strength Report (DX17-22) indicates that, as of December 31, 1994, there were 2697 individuals in the CFD rank of firefighter, 700 of whom were black (25.95%), and 231 of whom were Hispanic (8.56%). Calculating the "20% over" percentages in the firefighter rank for 1994, the affirmative action plan called for promotions of no more than 31.14% black and 10.27% Hispanic, for a total minority promotion percentage of 41.41%. As of March 1, 1997, the CFD had made 36 minority promotions beyond the promotions that otherwise would have been made had the strict rank

order procedure been used to reach the total of 168 promotions. Of the 36 net non-rank order affirmative action promotions, (CFFU Tr. at 2018), black firefighters received 26 promotions and Hispanic firefighters received 10 promotions. Because there were so few black and Hispanic fire engineers before the new promotions,[8] these promotions, though slanted in favor of minority firefighters, did not bring the racial and ethnic composition of the fire engineer rank into conformity with the racial and ethnic composition of the CFD's firefighter rank which, as of December 31,1996, was 33.5%. (DX17-22). Additionally, it did not bring the minority proportion of the fire engineer rank into conformity with the expected minority composition of the CFD's fire engineer rank in 1992 of 45.34% (33.29% African-American and 12.05% Hispanic). (DX 17-27).

Adding the 375 fire engineers reported in the Uniform Strength Report (DX17-22) as of December 31, 1996, to the 30 promotions shown by the considered evidence to have occurred on January 1 and March 1, 1997,[9] the percentage of black fire engineers was approximately 24.69% (100/405) and the percentage of Hispanic fire engineers was approximately 7.65% (31/405). The increase in the number (as distinct from percentage) of fire engineers promoted over

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[8] The parties also stipulated that:

> During the year 1993, the number of uniformed members of the CFD holding the rank of fire engineer was 508, among whom 82.40 (419) were white, 13.90 (70) were black, and 3.50 (18) were Hispanic.

(Stip. p. 92, ¶ 24)

[9] The court, in calculating the 1997 promotions, only considered the 17 stipulated minority promotions, (Stip. pp. 95-96, ¶¶ 27H, 27 I), the 3 white plaintiffs, Edward Budill, Albert Mirza, and Peter Eck, (Stip. pp. 104-06, ¶¶ 44-46), and the 10 whites promoted on March 1, 1997 which the court deduced from the promotion numbers in the parties' stipulations. (Stip. p. 93, ¶ 27 and p. 107, ¶ 51). The court could not discern the race and ethnicity of those promoted as shown in JX H-15.

what it would have been without the affirmative action plan was 26 African-Americans and 10 Hispanics. (CFFU Tr. at 2018).

The test is whether this increase is a plausible lower bound estimate of a short fall in minority representation among fire engineers that is due to the CFD's intentional discrimination in the past. This court finds it is. The result of the affirmative action plan as of March 1, 1997 was to boost the minority proportion of fire engineers to about 32.4%, which as stated earlier, was still below the percentages of minorities in the CFD's firefighter rank at the end of 1996 of 33.5% (910/2714) (DX 17-22), and still below the 1992 expected percentage of minority representation in the fire engineer rank of 45.34% (33.29% African-American and 12.05% Hispanic). (DX17-27). Discounting the 1992 total expected minority percentage in the fire engineer rank of 45.34%, by 28% to account for the sustainable hire rate, the lowest expected minority percentage as of 1992, would have been 32.64% in the fire engineer rank. The 32.4% minority proportion of the fire engineer rank for 1997 calculated here based on the evidence considered still remained slightly below that discounted, lowest expected percentage of 32.64%.

Although an exact determination cannot be made until the figures as to all the promotions to fire engineer from the 1994 eligible list are available, it is clear the adverse impact on whites, as a practical matter, was minimized and consistent with effective remediation. The vast majority of whites suffered no adverse impact. As for the plaintiffs, who had been promoted as of March 1, 1997, the average delay was less than four months, which was only one-third the delay of a year the Seventh Circuit characterized as "temporary" in *McNamara*, 138 F.3d at 1221. The City's affirmative action promotions using the list of eligible candidates resulting from the 1994 fire engineer exam were narrowly tailored consistent with effective remediation and did not violate the Constitution.

The City's Use of Banding

Contrary to the plaintiffs' counsel's arguments, the City's use of banding, as a means to determine which minority candidates would be promoted in non-rank order, was appropriate, permissible, and lawful. Banding is a legal recognized approach to making selection decisions from test scores. Banding accounts for the degree of error that is present in test scores and uses that information to determine the effect of that error on individual scores. The term "SEM," standard error of measurement, is the degree of error for a test and is used to establish a range of scores in which an examinee's true score likely falls. The term "SED," standard error of difference, is calculated by multiplying the SEM by the square root of 2 (1.414), and is used to determine the reliability of the difference. The City used a band of 2 SEDs which is an accepted level of confidence in the field of industrial psychology (CFFU Tr. at 3373) and provides a 95% degree of confidence that the scores within the band do not reliably differ.

Plaintiffs cite no case authority for their position that the banding is the same as the "race norming" barred by section 106 of the 1991 Civil Rights Act.[10] Both the Second Circuit and the Ninth Circuit have recognized banding as a lawful and proper tool that can be used when remedying the effects of past discrimination. *See Officers for Justice v. Civil Service Comm'n of San Francisco*, 979 F.2d 721, 727-28 (9th

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[10] Section 703(1) of Title VII (Pub. L. 102-166, § 106), 42 U.S.C. § 2000e-2(1), states as follows:

> (1) Prohibition of Discriminatory use of test scores
>
> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

Cir. 1992); *Bridgeport Guardians Inc. v. City of Bridgeport*, 933 F.2d 1140, 1148-49 (2d Cir. 1991). The legislative history of the 1991 Civil Rights Act points in favor of defendant's position. *Eg.* H. R. Rep. No. 102-40(11), 102 Cong., lst Sess., 731 (1992). Banding is not an adjustment of scores and is not an alteration of the results of the promotional tests. It is the recognition of the similarity among the scores achieved by test takers based upon the quantifiable criterion of the error in measurement.

Although banding was only used by the City during its consideration of the promotions made following the 1993 lieutenant and 1994 engineer examinations, the City established at trial that a review of all the non-rank order promotions at issue indicated that all the promotions at issue in this case were within bands of statistically indistinguishable scores. (Joyce Dr. at 99-100,121-22,147-47, 161-62, 176, and 187-88). The non-rank order promotions here which all fell within two SED bands are equally valid alternatives to strict rank order promotions. The scores of the minority personnel who received non-rank order promotions were statistically the same as the score of the non-minority personnel promoted at the same time. *See Officers for Justice*, 979 F.2d, saga, at 727-28.

The City carefully and conservatively established and used banding in the appropriate way. The City conservatively set the 2 SED band, which provided a recognized 95% confidence level that the scores in the band are statistically indistinguishable, before each promotional order was issued for promotions from 1993 lieutenant exam list and the 1994 engineer exam list. The City did not slide the band after each promotion and thereby limited the number of promotions that could be made at one time. The City minimized the adverse impact on white candidates through its use of a set, not a sliding, band for the purpose of selecting candidates who were promoted together in a single CFD personnel order.

Contrary to plaintiff Richard Temple's allegations in Count II of the Sixth Amended Complaint in Case Number 93 C 6175, the City's use of banding in making the CFD decisions to promote eligible candidates from the list resulting from the 1993 lieutenant exam did not violate 42 U.S.C. § 2000e-2(1).

The Burden of Proof

As a result of the City's concession from the outset of this litigation that it *prima facie* violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution, the City undertook the initial burden of production to establish its defense to justify the CFD's use of race and ethnicity in the disputed promotion decisions. The City established that it had a compelling governmental interest in the need to remedy past intentional discrimination. The City established that its affirmative action plans were narrowly tailored to remedy the CFD's past intentional discrimination's lingering effects.

The issue of whether it is the plaintiffs or the defendant who must carry the ultimate burden of proof has become of little moment, because of the City presented exceedingly persuasive evidence, which remained unrebutted by plaintiffs. The City was required initially to establish that the City, before undertaking the disputed affirmative action promotions, had "a strong basis in evidence," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986), of the compelling governmental interest in remedying the CFD's past intentional discrimination. The City proved this persuasively. The City then had to prove that the effects of the CFD's past discrimination continued to linger within the CFD promotional ranks. The City proved this persuasively. The City also had to establish that its plan for remedying the lingering effects of the CFD's past intentional discrimination was narrowly tailored, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995), to minimize, as a practical matter, the adverse effects on non-minorities consistent with effective

remediation. The City proved this persuasively. Plaintiffs did not rebut the City's persuasive evidence on any of these points.

In *Hill v. Ross*, 183 F.3d 586 (7th Cir. 1999), the Seventh Circuit clarified that for plaintiff employees to prevail they bear the burden of overcoming an employer's affimative action justification for employment decisions that would otherwise violate Title VII or the Equal Protection Clause of the Fourteenth Amendment to the Constitution. Therefore, plaintiffs here bear the ultimate burden of proof. *See Majeske v. City of Chicago*, 29 F. Supp.2d 872 (N.D. Ill. 1998). The plaintiffs failed to meet their burden.

CONCLUSION

The City's evidence and arguments have been exceedingly persuasive. Before the City undertook each affirmative action plan at issue here, it had strong and convincing evidence of the CFD's past intentional discrimination against minorities, the lingering effects thereof, and the compelling need for remedial measures. Under all the circumstances shown by the evidence, the only alternative the City had available to it to remedy the lingering effects of the CFD's past intentional discrimination was to make the limited, non-rank order promotions that were made pursuant to each affirmative action plan. By implementing each affirmative action plan in the way that it did, the City narrowly tailored the remediation and, as a practical matter, minimized the adverse impact on whites consistent with effective remediation. The City's methods and procedures violated neither the Constitution nor Title VII.

Once the lingering effects of the CFD's past intentional discrimination are remedied, the City will be prohibited by the Constitution and the laws of this country from engaging in the conduct found lawful here. The non-minority plaintiffs suffered intentional discrimination by the CFD as did African

Americans and Hispanics in the past according to the evidence. The court empathizes with anyone who is victimized by discrimination and looks forward to that day when racial and ethnic discrimination, as well as the vestiges thereof, are truly in the past. That day had not yet arrived in the CFD, according to the evidence, when the City made the justified and constitutional affirmative action promotions challenged here. The City is entitled to judgment in its favor against each plaintiff in each case.

ENTER:

JAMES F. HOLDERMAN
United States District Judge

DATED: December 30, 1999

APPENDIX C

UNITES STATES CIRCUIT COURT OF APPEALS
SEVENTH CIRCUIT

Case Nos. 97-1783, 97-1784.

JAMES A. MCNAMARA, *et al.*,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 93 C 1098 & 93 C 3028—Suzanne B. Conlon
& James F. Holderman, Judges.

Argued January 15, 1998
Decided March 18, 1998

Before POSNER, Chief Judge, and COFFEY and RIPPLE, Circuit Judges.

POSNER, Chief Judge

Nine white officers of the Chicago Fire Department brought this suit in 1993 against the City and City officials, charging racial discrimination in promotions. After a bench trial, the district judge gave judgment for the defendants and dismissed the suit. All of the plaintiff officers were lieutenants in 1987 and took the exam given that year for promotion to captain. Three of them had done well on the exam only to be passed over in favor of black and Hispanic lieutenants who received lower scores. These three white officers were, however,

promoted to captain a year later. The other six plaintiffs did not do as well on the exam and were denied promotion outright, rather than merely being delayed for a year.

We had a pair of similar cases several years ago (though with different plaintiffs), involving a challenge to affirmative action in promotions in the Chicago Fire Department, including promotions to captain. *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir. 1993) (en banc). Those cases had been decided—prematurely, we ruled—on summary judgment; now we have a decision to review that was based on a full trial. But before getting to the merits, we address two jurisdictional issues.

The first, which actually is frivolous though urged by the appellants as their first ground of appeal, is whether the district judge had jurisdiction, after the appeal was filed, to replace "Chicago Police Department" with "Chicago Fire Department" in one sentence of the opinion. As this was the correction of a clerical error, it could be made by the district judge "at any time," Fed. R. Civ. P. 60(a), even after jurisdiction over the case shifted to this court by virtue of the filing of the notice of appeal. *Local 1545 v. Inland Steel Coal Co.*, 876 F.2d 1288, 1292 n. 4 (7th Cir. 1989); *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir. 1997). Even if this were wrong, and the error could not be corrected while the case was on appeal, the existence of a trivial error, obviously merely typographical, in the district court's opinion would not be a ground for reversing the judgment.

The second jurisdictional issue is substantial, but also not dispositive of the appeal. It concerns the standing of the six plaintiffs who were denied promotion outright. They ranked between 152 and 166 in the scoring of the 1987 exam for captains. Had the City promoted in strict rank order, without any favoritism for members of minority groups, it would have promoted 143 of the examinees and reached number 146 (because three of the top 146 scorers waived promotion); no

one ranking below 146 on the exam would have been promoted. It is true that the actual number of promotions made was not 143, but 161, and that the last promotion would have been 166 (because there were two more waivers) had promotions been made in strict rank order. But the additional 18 promotions (161-143) were made pursuant to the same affirmative action plan that was responsible for the favored treatment of which the plaintiffs are complaining. Had there been no favoritism, the six low-ranking plaintiffs would not have been promoted, because promotions would have stopped at 146 and the highest-ranking of these plaintiffs was as we said number 152.

A plaintiff who would have been no better off had the defendant refrained from the unlawful acts of which the plaintiff is complaining does not have standing under Article III of the Constitution to challenge those acts in a suit in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976); *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge*, 9 F.3d 1290 (7th Cir. 1993). That appears to be (but, as we are about to see, may not be) the situation of these six plaintiffs. The remaining plaintiffs clearly were hurt by the affirmative action plan, because they ranked in the top 146 but were passed over to make room for minority lieutenants. The harm was temporary, because they were promoted to captain a year later, and therefore limited; but obviously not so limited as to deprive them of standing.

But just as a person may recover damages for emotional distress caused by his having been denied due process of law, even though if he had received due process he would still have lost the case in which the procedural violation occurred, *Carey v. Piphus*, 435 U.S. 247, 263-64 (1978), so it can be argued that a person denied a benefit on an invidious ground may obtain damages for emotional distress caused by that

denial even if he would have been denied the benefit anyway. And *Price v. City of Charlotte*, 93 F.3d 1241, 1245-48 (4th Cir. 1996), so holds. Neither the Supreme Court nor this court has had occasion to examine the question. The objection to the answer given by Price is that it enormously multiplies the number of potential plaintiffs in equal protection cases; persons who had not been harmed in the usual sense could nonetheless sue for damages resulting from the insult implicit in any denial to a person of the equal protection of the laws. But this is not the case in which to try to wrestle the issue to the ground. Since three of the plaintiffs have standing, the merits issue cannot be avoided, and in these circumstances we may elide the jurisdictional issue. *Steel Co. v. Citizens for a Better Environment*, No. 96-643, 1998 WL 88044 at *9 (U.S. March 4, 1998). And we may do so for the additional reason that, given the claim of damages for emotional distress, the jurisdictional issue is not whether the plaintiffs have been harmed (Article III) but whether they should be allowed to sue for that harm (zone of interests). The latter type of jurisdictional issue ("prudential standing" as it is sometimes called) may be bypassed in favor of deciding the merits when the outcome is unaffected and the merits issue easier than the jurisdictional issue. *Id.*

So let us turn to the merits. The parties agree that minority lieutenants received favorable treatment on account of their race (in the case of the blacks) and their ethnicity (in the case of the Hispanics) and that such treatment is a denial of equal protection unless it can be justified under the demanding standard that goes by the name "strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236-37 (1995). They further agree, as they also must under the cases, that one justification that passes muster under this demanding standard is that the favored treatment is necessary to remedy unlawful discrimination in the past by the entity conferring the favor. *E.g., People Who Care v. Rockford Board of Education*, 111 F.3d 528, 535 (7th Cir. 1997). Whether other justifications

are possible is unsettled, *United States v. Paradise*, 480 U.S. 149, 167 n. 18 (1987); compare *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion); *Taxman v. Board of Education*, 91 F.3d 1547, 1557 (3d Cir. 1996); and *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996), with Regents of the *University of California v. Bakke*, 438 U.S. 265, 311-14 (1978) (opinion of Justice Powell), but this court has held that at least in the area of policing and corrections it is possible to justify nonremedial affirmative action upon a showing—which must however be based on evidence rather than merely on conjecture—that such action is necessary to the accomplishment of important law-enforcement objectives. *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996).

At argument there was some discussion of whether a similar justification might be available in the case of firefighters, who may lack credibility, and be denied cooperation, in minority neighborhoods if the firehouses in those neighborhoods have only white personnel. *Cf. Alexander v. Estepp*, 95 F.3d 312, 316 (4th Cir. 1996); *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 213 (4th Cir. 1993). But as the City presented very little evidence of this at trial, it is not available to support the judgment on appeal. Racial discrimination cannot survive challenge without compelling evidence; even highly plausible speculation will not do. *Id.* at 214; *Wittmer v. Peters, supra*, 87 F.3d at 918-19.

So the only available justification is the remedial one, and it requires proof both that the City engaged in racial and ethnic discrimination in the employment of firefighters in the past and that the remedy is narrowly tailored to the violation, which means, as a practical matter, that it discriminates against whites as little as possible consistent with effective remediation. *Shaw v. Hunt*, 116 S. Ct. 1894, 1902-03 (1996); *Billish v. City of Chicago, supra*, 989 F.2d at 893; *Contractors Association of Eastern Pennsylvania, Inc. v. City*

of Philadelphia, 91 F.3d 586, 596 (3d Cir. 1996); *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994). To assess the validity of the remedy in this case requires us to review the evidence on both these fronts (past violation and tailored remedy), giving proper weight to the district judge's findings of fact—a precept the plaintiffs ignore.

Until comparatively recently the City employed very few minority firefighters relative to their proportion of the city's population. As late as 1974, only 4 percent of the firefighting force was black and only one-half of 1 percent was Hispanic (figures essentially unchanged from 1950, the earliest year for which there are statistics in the record), even though blacks and Hispanics accounted for a much higher percentage of the city's population. (Blacks alone were almost a third of the city's population in 1970.) Raw statistical disparities prove little; they certainly do not prove intentional discrimination. A glance at almost any occupation in the United States will reveal disparities, often stark, between the racial, ethnic, religious, and sexual composition of the occupation and that of the American population in general, and not all of these disparities are plausibly attributable to intentional, or for that matter unintentional, discrimination, let alone intentional discrimination by the particular employer that has been sued. Racial, ethnic, religious, and sexual identity are correlated with attitudes, accomplishments, tastes, experiences, aspirations, opportunities, educational background, and other aspects of personality and personal history that bear on eligibility and suitability for, and the choice of, a particular occupation. Some of the differences may of course be due to discrimination, but the only discrimination for which an employer is liable is the discrimination that he engages in.

The statistician who testified for the City tried to correct for some of the nonculpable factors that bear on occupational choice by comparing the racial and ethnic composition of people who applied for jobs with the Chicago Fire

Department with the racial and ethnic composition of the city's population in the relevant age group, viewed as a control group. It turned out that at least in the case of blacks the composition of the applicant group was similar to that of the control group, indicating that in the early 1970s blacks were being hired at a lower rate than white applicants, since they were applying at a similar rate yet were underrepresented in the fire department. Even this, of course, was not decisive, for the whites might simply have had better aptitudes. Whites on average have more years of schooling than blacks, and this is important in many jobs—but not, so far as the record shows, in a firefighter's job, where no college is required and the entry-level firefighter's job does not, at least according to this record, require special skills, *see also Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1554 (11th Cir. 1994), let alone skills correlated with membership in particular racial or ethnic groups. We note, however, that the statistician's evidence does not suggest discrimination in the hiring of Hispanics, who until the middle 1980s applied for firefighters' jobs at a substantially lower rate than their percentage of the relevant age group.

In 1974, the City settled a discrimination suit by the federal government by agreeing to hire a much higher percentage of blacks and Hispanics. But immediately the City instituted a hiring freeze as a result of which no firefighters of any race were hired for three years. When the freeze ended, the percentage of black and Hispanic firefighters was no higher than it had been in 1950, even though the black and Hispanic percentage of the population of Chicago had doubled.

In 1979, upon motion by the Department of Justice to enforce the consent decree, the district court issued a further order requiring preferential hiring of blacks and Hispanics. The Department also questioned the exam that the City had administered in 1978 for promotion to lieutenant and captain; the exam contained a large subjective component and had not

been shown to test for the knowledge and skills actually required in a fire lieutenant or captain. Again the City settled. The City redid the exam; and it was the redone and presumably race-neutral exam that was administered to would-be captains in 1987. Because so few blacks and Hispanics had been hired in the 1960s and 1970s, and because it takes many years for a firefighter to work his way up to lieutenant—and only lieutenants are eligible for promotion to captain—in 1986 only 2.6 percent of the captains were black and only 1 percent were Hispanic, even though by this time a majority of the City's population was black or Hispanic.

There was also direct evidence of racial discrimination in the Chicago Fire Department up to and into the 1980s, much of it concerning the racial policies of senior officials of the department, including one Fire Commissioner. The plaintiffs point out that no minority witness testified that he had applied and been turned down for an entry-level position and that the minority witnesses who had been hired and did testify had been promoted, in some cases to the very top. This was certainly evidence for the district judge to consider. But there was enough contrary evidence to justify the judge's conclusion that until sometime during the 1980s the people running the fire department endeavored with considerable success to make the department uncongenial to blacks and Hispanics. This conclusion in turn justified an inference that the underrepresentation of blacks and Hispanics in the various ranks, including that of captain, was due, at least in part, to discrimination by the City.

The groundwork thus was laid for justifying on remedial grounds the application of a plan for affirmative action to the results of the 1987 captains' examination. The exam itself is conceded to have been fair, and had promotions been made in strict order of rank on the exam 20 of the 143 lieutenants promoted would have been black (14 percent) and 5 would

have been Hispanic (3.5 percent, though the figure in the record is a mysterious 4.7 percent). The affirmative action plan called for increasing the fraction of minority lieutenants promoted to captain to 20 percent black and 5 percent Hispanic, but for doing so with minimum adverse impact on whites. To this end, the City made the 18 additional promotions, for a total of 161, of which 31 were of black lieutenants and 9 were of Hispanic lieutenants. Because there were so few black and Hispanic captains before the new promotions, these promotions, though slanted in favor of the minority lieutenants, did not bring the racial and ethnic composition of the fire captains into conformity with the racial and ethnic composition of either the city population (corrected for age) or the fire department as a whole. In 1992, immediately after the completion of the promotions, the percentage of black captains was 10.8 percent and the percentage of Hispanic captains 3.6 percent. Had it not been for the affirmative action plan, these percentages would have been 5.7 percent and 1.7 percent in a city the population (age adjusted for comparability) of which is, as we said, more than half black or Hispanic.

The increase in the number (as distinct from percentage) of black captains over what it would have been without the affirmative action plan was 11 and of Hispanic captains 4, and it could be argued that the City must demonstrate a compelling interest in such an increase. But that would be the wrong approach in a case in which the justification for affirmative action is remedial. The test is, rather, whether the increase is a plausible lower-bound estimate of a shortfall in minority representation among fire captains that is due to the fire department's intentional discrimination in the past. *See Aiken v. City of Memphis*, 37 F.3d 1155, 1165 (6th Cir. 1994) (*en banc*); *Peightal v. Metropolitan Dade County, supra*, 26 F.3d at 1558; cf. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434-37 (1976); *People Who Care v. Rockford Board of Education, supra*, 111 F.3d at 534. And

we think it is. The result of the affirmative action plan was to boost the minority proportion of captains to 14.4 percent, which was still far below the minority proportion of the city's population and of the lowest rank in the fire department (29 percent minority). The percentage in the lowest rank may be inflated to some extent by affirmative action. But considering the history of discrimination by the City and the minimal educational requirements for being a firefighter, we think it a reasonable surmise (and no more is practicable, given the nature of the inquiry) that, had it not been for the City's discrimination against blacks and Hispanics in the past, the percentage of black and Hispanic captains would be at least a third of the potential applicant pool; and that is all it is, even with the affirmative action challenged here.

It remains to consider the plaintiffs' contention that the doctrine of judicial estoppel barred the City from trying to prove that it had engaged in intentional discrimination in the past, since in earlier litigation it had, unsurprisingly, denied that charge. The doctrine provides that a party who prevails on one ground in a lawsuit cannot turn around and in another lawsuit repudiate the ground. *Davis v. Wakelee*, 156 U.S. 680, 689-91 (1895); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427-28 (7th Cir. 1993); *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1547 (7th Cir. 1990); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212-13 (1st Cir. 1987). If repudiation were permitted, the incentive to commit perjury and engage in other litigation fraud would be greater. *Chaveriat v. Williams Pipe Line Co.*, supra, 11 F.3d at 1428. A party envisaging a succession of suits in which a change in position would be advantageous would have an incentive to falsify the evidence in one of the cases, since it would be difficult otherwise to maintain inconsistent positions. The doctrine of judicial estoppel requires, however, that the party sought to be estopped have

obtained a favorable judgment or settlement (*Kale v. Obuchowski*, 985 F.2d 360, 361-62 (7th Cir. 1993)) on the basis of a legal or factual contention that he wants to repudiate in the current litigation. Otherwise it would be inconsistent with the rule that permits inconsistent pleadings. *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp., supra*, 910 F.2d at 1548. The City did convince a district judge, in the first suit brought by the Department of Justice, that it had not discriminated against blacks and Hispanics during part of the period covered by the present litigation. But it abandoned that position on appeal and so never obtained either a favorable judgment or a favorable settlement on the basis of it. The doctrine of judicial estoppel is inapplicable.

The plaintiffs make other arguments, based mainly on evidentiary rulings by the district judge; but these do not have sufficient merit to warrant discussion.

Affirmed.

Supreme Court, U.S.
FILED
SEP 28 2001
OFFICE OF THE CLERK

No. 01-365

In the Supreme Court of the United States

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's findings that the affirmative action plans implemented by the Chicago Fire Department during the late 1980s and early 1990s were narrowly tailored to redress prior discrimination were clearly erroneous.

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In the Supreme Court of the United States

No. 01-365

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

These five consolidated cases, filed by the Chicago Firefighters Union Local No. 2 and 93 individual plaintiffs, challenge promotions made in the Chicago Fire Department ("CFD") between 1987 and 1997 to the ranks of fire engineer, lieutenant, captain and battalion chief as part of an affirmative action program. See Pet. App. 17a. The plaintiffs—petitioners in this Court—concede that the CFD engaged in intentional discrimination against African-Americans and Hispanics until the 1980s, and question only whether the affirmative action plans at issue for four promotional ranks in the CFD were narrowly tailored remedies for that conceded discrimination. See Pet. App. 2a. The cases were consolidated for a bench trial held intermittently for nearly two years, which concluded with a finding against petitioners. See Pet. App. 18a. The court of appeals affirmed. See Pet. App. 13a.

The Affirmative Action Plans: In a June 16, 1987 letter, Chicago's Commissioner of Personnel Jesse Hoskins recommended adopting an affirmative action plan for making promotions based on the results of the 1985 fire engineer promotional examination with a goal of 20% African-American and 5% Hispanic promotions, noting that no race-neutral method was available to redress the continuing effects of the CFD's prior discrimination, which had produced gross minority underrepresentation in that rank. Def. Ex. 1-3. Promotions were then made consistent with the recommendation. Joyce Tr. 91.[1] The test scores of the firefighters promoted through affirmative action were within the same statistical range as the scores of nonminorities who would otherwise have been promoted, and as a result there was no meaningful difference between the qualifications of the candidates. Joyce Tr. 99.[2] Under the affirmative action plan, the vast majority (76%) of those promoted from the 1985 engineer list were nonminorities, and all who were promoted were qualified. Joyce Tr. 100; R. 116, Schedule A at 20.

In a July 9, 1987 letter, Commissioner Hoskins also recommended affirmative action promotions based on the results of the 1987 fire captain examination with a goal of 20% African-American and 5% Hispanic promotions, in order to remedy the continuing effects of prior discrimination in that rank. Def. Ex. 2-1. Again, all of those receiving affirmative action promotions had scores that were

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[1] Deputy Commissioner of Personnel Robert Joyce presented his direct examination through written testimony, which we cite as "Joyce Tr."

[2] This conclusion is based on the concept of a statistical "band," a generally accepted method for determining whether scores on an employment examination are statistically distinguishable. Scores falling within a single band, defined as scores within two times the standard error of difference on an examination, are considered statistically equivalent within a 95% degree of confidence. Joyce Tr. 98-99, Tr. 3372-73.

statistically indistinguishable from the nonminorities who would otherwise have been promoted. Joyce Tr. 122. The vast majority of those promoted were white, and all who were promoted were qualified. Joyce Tr. 123.

In a July 26, 1989 letter, Chicago's new Commissioner of Personnel Glenn Carr recommended that five affirmative action promotions be made to the rank of battalion chief to supplement the rank-order promotions made pursuant to the 1989 battalion chief examination and that the CFD utilize a goal of awarding 20% of all promotions to African-Americans and 5% to Hispanics. Def. Ex. 3-1. Commissioner Carr noted that as a consequence of prior discrimination, there was then only one African-American battalion chief and one Hispanic battalion chief, and that the goals he recommended would help to redress minority underrepresentation caused by that discrimination. *Ibid.* Until July 1992, the City followed this recommendation. Joyce Tr. 140-41. In July 1992, the City adopted a new affirmative action policy for battalion chief, utilizing a goal of promoting African-Americans and Hispanics at 120% of their representation at the rank of captain (the rank from which promotions are made), in order to more closely tailor the goal to actual minority representation at the rank of captain, while recognizing that minority representation in that rank was growing and that the disparity between minority representation at the ranks of captain and battalion chief would diminish only if minority promotions were made in some modest increment above current minority representation at the rank of captain. Joyce Tr. 142. All captains promoted through affirmative action to the rank of battalion chief were qualified and had scores statistically indistinguishable from those they passed over. Joyce Tr. 146-47.

In a July 14, 1992 letter, Commissioner Carr recommended affirmative action promotions based on the results of the 1991 fire captain promotional examination, based on his finding

that minorities were underrepresented at that rank as a result of prior discrimination. Def. Ex. 4-1. Affirmative action promotions were limited to a goal of 120% of the representation of minorities in the rank of lieutenant, the rank from which promotions to captain are made. *Ibid.*; Joyce Tr. 160-61. All persons receiving affirmative action promotions had scores statistically indistinguishable from those they passed over. Joyce Tr. 162. All candidates promoted were qualified, and the vast majority of those promoted were nonminorities. Joyce Tr. 163.

By letter dated December 6, 1993, Commissioner Carr proposed use of affirmative action for promotions based on the results of the 1993 fire lieutenant examination in order to redress the continuing effects of prior discrimination, with a goal of promoting minorities at a rate of 120% of the minority composition of the ranks eligible for promotion (firefighter and engineer), provided that those receiving out-of-rank promotions had statistically indistinguishable scores from those they passed over. Def. Ex. 5-2. All of those who received affirmative action promotions had scores on the examination statistically indistinguishable from those they passed over. Joyce Tr. 176-77. All those promoted were qualified, and the vast majority of those promoted were nonminorities. Joyce Tr. 177-78.

By letter dated December 1, 1994, Commissioner Carr recommended the use of affirmative action for promotions based on the results of the 1994 fire engineer examination in order to redress the continuing effects of prior discrimination in that rank, with a goal of promoting minorities at a rate of 120% of their representation in the rank from which promotions are made (firefighter), provided that the firefighters promoted to engineer on the basis of affirmative action had scores that were statistically indistinguishable from those they passed over. Def. Ex. 6-2. And all such firefighters had scores within the range of statistical

insignificance. Joyce Tr. 188. The vast majority of those promoted were nonminorities. R. 116, Schedule A at 113.

Throughout its implementation of the affirmative action policies adopted for use in connection with the seven promotional examinations at issue in this litigation, the City continued to review the affirmative action plan each time it made promotions to ensure that those promotions remained a narrowly tailored remedy for the continuing effects of prior discrimination in the ranks to which promotions were made. Joyce Tr. 123, 148, 163, 178, 189-90.

Historical Evidence of Discrimination: The district court found that until the 1980s, the CFD had engaged in a pervasive pattern of intentional discrimination against African-Americans and Hispanics. Minority representation in the CFD was artificially reduced by discriminatory hiring and promotional practices and the existence of a hostile working environment that deterred minorities from even seeking employment with the CFD. The district court's findings on this point document the extent to which minorities were discriminatorily excluded from hiring and promotion by the CFD, and for that reason deserve to be set out at some length:

> The evidence established that "purposeful discrimination" was the policy of the City's Fire Commissioner Robert J. Quinn during his tenure from 1957 to 1977. Commissioner Quinn, who only grudgingly began integrating the CFD in 1965 after complaints and public riots against the CFD's racist policies, made clear his racial and ethnic animus in several ways. Commissioner Quinn referred to the CFD's integrated snorkel squads derogatorily as "freedom wagons." In the early 1970s, Commissioner Quinn was explicit in his ethnically biased belief that Hispanics as an ethnic group were not tall enough to fight fires in Chicago. Commissioner Quinn also expressed his resistance to racial integration to James

Winbush, an African-American in the CFD and one of the founders of the African-American Firefighters League, who was known to Commissioner Quinn to be concerned about the CFD's racial discrimination and the hiring and promotion of blacks:

"What are you worrying about them niggers for? They're only going to come in and screw up our job."

During the 20 years of Commissioner Quinn's term as the head of the CFD, as the racial and ethnic population of Chicago increased dramatically, the percentage of minority CFD personnel remained stagnant at less than 5%. Consistent with Commissioner Quinn's expressed prejudices, the pattern of intentional past discrimination by other City officials dealing with CFD applicants continued through that same time period when City officials used the pretext of physical deficiencies such as "heart murmurs," and "flat feet," or pretextual job requirements such as a minimal height requirement to exclude minority applicants to the CFD. Alderman Leon Depres testified at trial how from the mid-1960s to the mid-1970s he continually complained to City officials, including Commissioner Quinn, in writing and in person about the racially discriminatory hiring, promotional and other practices of the CFD to no avail. His complaints were ignored as part of the City's intentional pattern of racial and ethnic discrimination. When the City in 1974 agreed to the entry of a consent decree in a lawsuit brought by the Department of Justice, which established an interim 50 percent minority (black and Hispanic) hiring ratio and a long-range hiring goal to increase the minority composition of the CFD, a hiring freeze was put in effect at the CFD to preclude the consent decree's implementation. To avoid hiring minority firefighters, the CFD hired no firefighters during 1974, 1975, and 1976, even though vacancies existed and funding was

available. Likewise, no promotions were made to any of the CFD promotional ranks during this same period.

In the 1970s, the racial and ethnic prejudices in the CFD were known in Chicago's minority communities, and deterred potential minority applicants who believed job opportunities at the CFD were not available to them. Potential minority applicants also believed that minority firefighters were not appreciated by the CFD because minorities were given more unpleasant assignments than whites. Potential minority applicants viewed firefighting in the CFD as a "white man's job" because of the CFD's intentional discrimination against minorities.

Even after the CFD hiring freeze was lifted in 1977 and the CFD started to hire minorities in greater numbers than before, certain CFD officials still harbored racial and ethnic bias. For example, at a CFD meeting prior to the start of the 1977 training class, the CFD Director of Personnel, who was white, said of minorities, "they can make us hire them but they can't make us keep them." At that meeting, another CFD official, who was white, also said of minorities: "We're not going to allow them to take over this Department."

It is undisputed that those African-Americans and Hispanics who applied and were hired by the CFD performed just as well as whites. In the late 1970s to the early 1980s, those minority members of the CFD found advancement to be slow compared to whites, and found it difficult to obtain good assignments compared to their white counterparts. There appeared to be a sequencing of minorities in the CFD's upper ranks. A minority candidate for promotion would not be promoted to the upper ranks unless another minority vacated the position. Minorities were not given the same opportunity as whites to take the responsibilities of a higher position,

and thereby gain experience that would help minorities advance to the CFD's upper ranks.

A way minorities were intentionally kept from advancing in the CFD was that they received lower promotional scores than whites through the use of subjective efficiency ratings by CFD officials. These subjective efficiency ratings were initially placed in the promotional applicant's scorecard in pencil by the promotional applicant's line supervisor. Efficiency ratings were then altered as consideration of minority applicants moved the CFD command structure. During Commissioner Quinn's term, he had the final say on what efficiency mark a promotional applicant would receive. Minorities historically received lower marks than whites due to Commissioner Quinn's intentional discrimination against minorities. After Richard Albrecht became fire commissioner in 1978, blacks seeking promotion continued to receive subjective performance efficiency ratings substantially lower than whites . . . .

Because of the hiring and promotional freeze from 1974 to 1977, as well as normal attrition from the CFD, by the late 1970s, the CFD was understaffed at all levels of uniformed fire personnel. In the absence of fire officers in certain of the upper ranks of the CFD during this period, lower ranking fire personnel had to "act up" or assume an officer duties above their assigned rankings. These fire officers were not financially compensated for the time when they acted up. Many members of the CFD became dissatisfied with the situation because the lack of manpower increased injuries and fire related deaths and decreased the morale of CFD firefighters. On February 14, 1980, most of the CFD personnel went on strike.

> In attempting to remedy the strike, during meetings among City officials, Local 2 officials, African-American firefighters, and others in 1980, Mayor Jane Byrne had admitted that there had been discrimination in the CFD against minorities and that she was going to change things.

Pet. App. 129a-33a (citations omitted). The 1980 strike produced a new collective bargaining agreement that called for the use of affirmative action to remedy prior discrimination. See Pet. App. 133a-35a.

Also in 1980, the United States filed its second lawsuit attacking employment discrimination in the CFD, this time challenging all of the promotional examinations then in use as violative of Title VII of the Civil Rights Act of 1964, as amended. Joyce Tr. 59-60. City officials concluded that they would be unable to defend the lawfulness of the examinations, and agreed to the entry of a consent decree requiring the City to establish a long-range goal of promoting minorities in sufficient numbers to make each promotional rank more representative of the racial composition of the rank from which promotions are made. Joyce Tr. 60-62, Tr. 3667-69, 3672; Jt. Ex. H-11. The 1985 fire engineer, 1986 lieutenant, 1987 captain, and 1989 battalion chief examinations were the first promotional examinations given subsequent to this decree and, accordingly, the first promotional examinations in which the City employed affirmative action. Joyce Tr. 68, 101, 124, 164.

Statistical Evidence of the Continuing Effects of Discrimination: At trial, Dr. Gerry Suchanek testified in defense of the affirmative action plans as an expert in economics, econometrics, and labor economics. Tr. 917-18; Def. Ex. 17-8. Dr. Suchanek examined the composition of the CFD workforce during the periods in which the affirmative action plans at issue were in use in order to determine whether minority representation in the CFD's

upper ranks was artificially depressed as a result of prior discrimination. Tr. 920-21, 982-85.

Dr. Suchanek opined that during the period of time that the CFD engaged in discrimination against minorities, but for discrimination, minorities would have applied to the department in numbers at least equal to their representation in the outside labor pool because the job required no special qualifications and would have been economically desirable to minorities. Tr. 1058-59, 1062. Moreover, applicant flow data from the 1974, 1978, and 1985 entry-level examinations demonstrated that minorities were qualified for employment since the racial composition of applicants found qualified by these examinations corresponded to the racial composition of the outside labor pool. Tr. 1040-41, 1053; Def. Ex. 17-11.

To determine the rate at which minorities would have been hired prior to 1974 absent discrimination, Dr. Suchanek first identified the racial composition of the qualified and interested outside labor pool during the period of time that the CFD engaged in discrimination. Tr. 987, 989, 1005; Def. Ex. 17-1 at 8. Then, Dr. Suchanek examined the hiring rate between 1985 and 1994, because during this period prior discriminatory barriers had been significantly reduced, if not eliminated. Tr. 1150. He used this analysis in order to account for minority interest in and qualifications for employment and then, finding that the minority hiring rate under this analysis was somewhat lower than minority representation in the outside labor pool, calculated a discounted minority hiring rate to account for the fact that even during a nondiscriminatory period, minorities were somewhat less likely than nonminorities to have been hired by the CFD. Tr. 1156-59. He referred to this discounted minority hiring rate as the "sustainable hire rate," which reflected a minimum estimate of the minority representation in the qualified and interested labor pool. Tr. 1151-52. He considered the rate sustainable because CFD data showed no

significant differences in attrition rates based on race. Tr. 1153-54. Using this sustainable hire rate, Dr. Suchanek then determined that African-Americans and Hispanics were grossly underrepresented in the CFD as a whole and in each promotional rank from 1950 through 1997. Tr. 981, 1094, 4613-14, 4626-36; Def. Exs. 17-1, 17-3, 17-4, 17-27, 17-28. He could identify no nondiscriminatory explanation for this pattern of under-representation. Tr. 982, 2782-83. These disparities persisted through 1993 in the CFD in the ranks of engineer, lieutenant, captain, and battalion chief. Tr. 4629-30, 4635-36.

Dr. Suchanek also identified two reasons for the continued underrepresentation of minorities in the upper ranks of the CFD into the 1990s. First, because most individuals who had been eligible to take the promotional examinations had been hired by the CFD at a time at which it engaged in entry-level discrimination, the pool of promotional candidates was artificially white. Tr. 2028-42. Second, his statistical analysis demonstrated that, until 1985, on average, even those minorities who had been hired were not promoted as quickly as nonminorities. Tr. 3045-46, 4650-51, 4670; Def. Ex. 17-26. Dr. Suchanek could find no nondiscriminatory explanation for this disparity. Tr. 2892-93; Def. Ex. 17-13, 17-27.

The District Court's Decision: In its findings of fact and conclusions of law following trial, the district court credited Dr. Suchanek's analysis, finding that even when the minority hiring rate was discounted to reflect minorities' interest in and qualifications for employment, the evidence demonstrated gross statistical underrepresentation of minorities within the ranks of the CFD "that constitute[s] proof of a pattern of past intentional discrimination within the CFD." Pet. App. 143a. The district court also found that the effects of this prior discrimination continued to be felt when the promotions at issue were made, because most of the pool

of incumbents eligible to take the promotional examinations at issue had been hired during a period of time in which the CFD engaged in intentional hiring discrimination against minorities (Pet. App. 143a-46a), and because the statistical evidence reflected that minority representation at all ranks of the CFD was lower than it would have been had there been no prior discrimination (Pet. App. 146a-52a).

The district court further found that the affirmative action plans at issue were a narrowly tailored remedy. It found that the CFD had no race-neutral alternative available to it to redress the continuing effects of prior discrimination in its upper ranks, since rank-order use of the promotional examinations at issue would not have permitted the CFD to take meaningful remedial action. Pet. App. 153a. The court also found that each of the affirmative action plans were based on a "credible assessment of the need for the affirmative action plan recommended after the results of each examination were analyzed . . . ." *Ibid.* The district court separately analyzed each group of promotions at issue and concluded that they were within the bounds of a narrowly tailored remedy for prior discrimination by redressing the shortfall in minority representation in the upper ranks due to prior discrimination, even when measured by a lowest-plausible bound estimate of the shortfall, while ensuring that ample promotional opportunities remained for nonminorities and that no meaningful difference existed between the qualifications of affirmative action promotees and the nonminorities they passed over. Pet. App. 152a-76a.

The Decision of the Court of Appeals: Affirming the judgment of the district court, the court of appeals first rejected petitioners' argument that the district court's analysis of the rates at which minorities would have been hired and promoted absent prior discrimination was flawed, concluding that there was no evidentiary support for their claim that the CFD required special qualifications for hiring and promoting

firefighters that minorities lacked. Pet. App. 3a-5a. The court also rejected petitioners' argument that narrow tailoring requires nonminorities to be protected against any adverse effects of affirmative action either by being offered financial compensation or additional promotions. Pet. App. 10a-12a. While the court of appeals acknowledged that an affirmative action plan may not unduly burden nonminorities, an undue burden is not present when "the only complaint is about a modest delay in promotion." Pet. App. 12a.

ARGUMENT

It is well settled that the Equal Protection Clause permits state and local governments to use narrowly tailored affirmative action to eradicate the continuing effects of their own prior discrimination. And the district court's detailed findings make clear that this settled principle was correctly applied here. The district court identified not only prior intentional discrimination in the CFD but also the effects of that prior discrimination that continued up to the time the promotions at issue in this case were made. Based on those findings, the court of appeals' conclusion that Chicago may undertake affirmative action until those effects have been eradicated was wholly unremarkable. That holding represents the application of settled principles of equal protection jurisprudence to the particular facts of this case. It is also consistent with the rulings of all other circuits to examine this question. Moreover, the highly fact-bound question whether the district court's findings enjoy sufficient evidentiary support is one of little general significance. While there may well be considerable uncertainty about the extent to which the Equal Protection Clause permits the government to use affirmative action in order to remediate discrimination against minorities in the private sector, a question this Court faces this Term in *Adarand Constructors, Inc. v. Mineta* (No. 00-730), this case does not present that problem. This case involves only settled principles concerning a public

employer's ability to remediate its own prior discrimination through affirmative action. Accordingly, it does not merit plenary review.

1. The district court found that the CFD had engaged in decades of discrimination against African-Americans and Hispanics. This discriminatory course of conduct produced underrepresentation of minorities in the upper ranks of the CFD that continued to the time of the promotions at issue in this case.

The district court identified two causes of the minority underrepresentation in the upper ranks. First, minority hiring was depressed through the use of pretextual hiring practices and the existence of a racially hostile workplace that deterred minority applicants. See Pet. App. 129a-31a, 140a-43a. This, in turn, resulted in underrepresentation of minorities in the promotional ranks as well, since "[d]iscrimination at the entry level necessarily precluded [minorities] from competing for promotions . . . ." *United States v. Paradise*, 480 U.S. 149, 168 (1987) (plurality opinion). Accord, *e.g.*, *Boston Police Superior Officers Federation v. City of Boston*, 147 F.3d 13, 20-21 (1st Cir. 1998); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1567 (11th Cir. 1994); *Stuart v. Roache*, 951 F.2d 446, 450-52 (1st Cir. 1991), cert. denied, 504 U.S. 913 (1992). See also Pet. App. 143a-49a. Second, discriminatory promotional practices further reduced minority representation in the upper ranks. See Pet. App. 131a-32a, 142a-43a. Accordingly, when the affirmative action plans at issue were adopted, minority underrepresentation in the upper ranks of the CFD was not the result of merit-based procedures that accurately assessed the qualifications and interests of minorities for advancement in the CFD, but instead was the product of a pervasive and decades-long effort to exclude minorities from joining and advancing in the CFD.

The district court also found that affirmative action provided the only means available to prevent the CFD's

hierarchy from remaining artificially white for another generation—until all the incumbents hired and promoted under the prior, discriminatory regime had retired. See Pet. App. 152a-54a. By departing from strict rank-order use of promotional examination results, the plans made meaningful progress toward making racial representation of the upper ranks more reflective of what it would have been absent prior discrimination, but without taking measures so aggressive as to unduly trammel the interests of nonminorities.

Petitioners attack the ability of a public employer to redress the continuing effects of its own prior discrimination by claiming that the Equal Protection Clause forbids public employers from undertaking any form of remedial action, no matter how narrowly tailored and no matter how pervasive and extreme the prior discrimination was, once discrimination has ceased. Thus, they argue that affirmative action may "endure only until a validated examination process was in place . . . ." Pet. 13. According to petitioners, the CFD, having finally designed and administered nondiscriminatory examinations in the mid-1980s pursuant to court order, could take no further steps to ameliorate the continuing effects of prior discrimination within its upper ranks. This position is wholly unsupported by the decisions of this Court, and has been rejected by every circuit to consider it.

This Court has consistently taken the view that the Equal Protection Clause permits the government to take affirmative action to redress the continuing effects of prior discrimination even after it has ceased. As the Court wrote in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995): "The unhappy persistence of *both* the practice *and the lingering effects* of racial discrimination against minority groups is an unfortunate reaiity, and the government is not disqualified from acting in response to it." *Id.* at 237 (emphasis supplied). See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in

the judgment) ("the State has the power to eradicate racial discrimination and its effects in both the public and private sectors and the absolute duty to do so where those wrongs were caused intentionally by the State itself"). Indeed, the Equal Protection Clause recognizes that the government has a compelling interest "in eradicating the effects of past racial discrimination." *Shaw v. Reno*, 509 U.S. 630, 656 (1993). Cf. *United States v. Virginia*, 518 U.S. 515, 547 (1996) ("A proper remedy for constitutional exclusion . . . aims to 'eliminate [so far as possible] the discriminatory effects of the past' and 'to bar discrimination in the future.'" (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965) (brackets in original)).

Precisely because a public employer has this compelling remedial interest, it follows that "[a] state's interest in remedying the effects of past or present racial discrimination may in the proper case justify the use of racial distinctions." *Shaw v. Hunt*, 517 U.S. 899, 909 (1996). Accord, *e.g.*, *Miller v. Johnson*, 515 U.S. 900, 922 (1995); *Shaw v. Reno*, 509 U.S. at 656; *Croson*, 488 U.S. at 509 (plurality opinion); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion).[3] That principle is fully applicable

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[3] Petitioners correctly observe that Justice Scalia has endorsed their view that the government may never use affirmative action to redress the continuing effects of prior discrimination. See *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment); *Croson*, 488 U.S. at 520-21 (Scalia, J., concurring in the judgment). But Justice Scalia is the only member of the Court ever to have taken this position. In *Adarand*, for example, seven members of the Court rejected Justice Scalia's view. See 515 U.S. 237; *id.* at 259-64 (Stevens, J., dissenting); *id.* at 269-71 (Souter, J., dissenting); *id.* at 273-74 (Ginsburg, J., dissenting). And in *Croson*, eight justices rejected this view. See 488 U.S. at 509 (plurality opinion); *id.* at 511 (Stevens, J., concurring in part and concurring in the judgment in part); *id.* at 518-19 (Kennedy, J., concurring in part and concurring in the judgment in part); *id.* at 555-61 (Marshall, J., dissenting). Petitioners are also correct that the affirmative action measures that the Court upheld in *Paradise* and *Local No. 28 of the*

here, since rank order use of the promotional lists at issue would have failed to redress continuing minority underrepresentation in the CFD's upper ranks, and hence, as the district court found, no remedy was possible without affording minorities some promotional preference. See Pet. App. 152a-54a.

Nor has petitioners' view enjoyed favor in the lower courts. In fact, no fewer than seven circuits have upheld affirmative action measures under strict scrutiny that continued to provide relief even after nondiscriminatory hiring or promotional practices had been implemented. See, *e.g.*, Pet. App. 10a-12a; *Majeske v. City of Chicago*, 218 F.3d 816, 823-24 (7th Cir. 2000), cert. denied, 531 U.S. 1079 (2001); *Boston Police*, 147 F.3d at 23-25; *McNamara v. City of Chicago*, 138 F.3d 1219, 1224 (7th Cir.), cert. denied, 525 U.S. 981 (1998); *Edwards v. City of Houston*, 37 F.3d 1097, 1112-15 (5th Cir. 1994), vacated on other grounds en banc, 78 F.3d 983 (1996); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-62 (11th Cir. 1994); *Jansen v. City of Cincinnati*, 977 F.2d 238, 242-44 (6th Cir. 1992), cert. denied, 508 U.S. 911 (1993); *Mackin v. City of Boston*, 969 F.2d 1273, 1278 (1st Cir. 1992), cert. denied, 506 U.S. 1078 (1993); *Stuart*, 951 F.2d at 453-55; *Donaghy v. City of Omaha*, 933 F.2d 1448, 1460-61 (8th Cir. 1991), cert. denied, 508 U.S. 1059 (1992); *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1446-47 (9th Cir. 1989),

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Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421 (1986), envisioned affirmative action only as an interim measure until nondiscriminatory hiring or promotional procedures had been devised, but even petitioners do not claim that those decisions held that the Constitution prohibits remedial action subsequent to the implementation of such nondiscriminatory measures. Indeed, in *Paradise* the dissenters argued that the affirmative action plan at issue was not a narrowly tailored remedy precisely because it would not remain in effect once nondiscriminatory promotional procedures were adopted. See 480 U.S. at 198 (O'Connor, J., dissenting).

cert. denied, 498 U.S. 897 (1990); *Howard v. McLucas*, 871 F.2d 1000, 1008-11 (11th Cir.), cert. denied, 493 U.S. 1002 (1989).

To be sure, the CFD's efforts to remediate prior discrimination lasted for a significant period of time after discrimination in the CFD ceased. Nevertheless, petitioners make no effort to put this fact in context. The CFD had discriminated against minorities for decades, creating massive minority underrepresentation in its upper ranks. Because appropriately tailored affirmative action must work modestly in order to avoid unduly trammeling the interest of nonminorities, remedial affirmative action necessarily operates slowly. Accordingly, the effects of prior discrimination continue to be felt for many decades in an institution such as the CFD.[4] Precisely because the careers of firefighters (especially those who are promoted into the upper ranks) last for decades, prior discrimination will have continuing effects for decades as well—as long as those hired and promoted under the prior discriminatory regime remain on the force. See, *e.g.*, *Paradise*, 480 U.S. at 168 (plurality opinion); *Boston Police*, 147 F.3d at 20-21; *McNamara*, 138 F.3d at 1224; *Ensley Branch*, 31 F.3d at 1567; *Stuart*, 951 F.2d at 450-52.

In short, there is nothing remarkable about the affirmative action plans at issue here, even in terms of their duration.

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[4] In an effort to expedite relief to some extent, the CFD utilized goals slightly above minority representation in the ranks eligible for promotion—first a goal of 20% African-American and 5% Hispanic promotions, and later goals representing 120% of minority composition in the rank below. In *Paradise*, a majority of the Court agreed that strict scrutiny can permit a goal somewhat higher than minority representation in the rank below in order to expedite relief. See 480 U.S. at 179-80 (plurality opinion); *id.* at 199-200 (O'Connor J., dissenting). In this litigation, petitioners have never attacked the numerical goals as excessive.

The Constitution does not require affirmative action to cease as soon as discrimination ceases; it would scarcely be affirmative action if it did. Instead, narrowly tailored affirmative action is permissible as long as the effects of prior discrimination continue. And contrary to petitioners' claim (Pet. 13-14), the decision below does not endorse unlimited affirmative action; it requires that affirmative action "cease at the point at which the consequences of the past discrimination have substantially dissipated." Pet. App. 6a. The district court's detailed findings demonstrate that the affirmative action plans at issue here were consistent with this rule, which is, in turn, consistent with the decisions of this Court and at least six other circuits. Plenary review is not warranted on this ground.

2. Petitioners also claim that the affirmative action plans at issue were not narrowly tailored because they contain no provision "for 'the *planned* duration of the remedy.'" Pet. 15 (emphasis in original) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 510 (1980) (Powell, J., concurring)). Petitioners acknowledge that the affirmative action plans expired by their terms at the conclusion of "the 'anticipated three year life' of an eligibility list" (Pet. 16), but disparage this as meaningless "boiler-plate language." *Ibid.* What we have said above, however, largely answers this claim as well.

As we explain above, when minority underrepresentation resulting from prior discrimination is pervasive and longstanding, it may take many years to eliminate the continuing effects of that discrimination. In this case, the district court found that all of the affirmative action promotions at issue were made when minority under-representation stemming from prior discrimination persisted in the CFD. See Pet. App. 152a-76a. The court of appeals subsequently concluded that the record supported the district court's findings on this point. See Pet. App. 6a-7a. And the test employed by the court of appeals to assess narrow tailoring was correct–precisely because the Equal Protection

Clause permits public employers to redress the continuing effect of prior discrimination, the "logical stopping point" for remedial action (Pet. 16) is "when the consequences of the past discrimination have substantially dissipated." Pet. App. 6a. Indeed, the court of appeals added that the requirement of narrow tailoring "means that as few white firefighters should have their promotions delayed to make way for blacks and Hispanics as is consistent with remedying the lingering effects of the fire department's long history of racial discrimination." Pet. App. 11a. As we explain above, this approach is consistent with this Court's decisions and the law in all other circuits that address this point. Thus, while the CFD continued to engage in affirmative action even after the initial non-rank-order promotions had been made as envisioned by Commissioner Hoskins' 1987 affirmative action plans for engineer and captain, and by Commissioner Carr's 1989 affirmative action plan for battalion chief, and his 1992 affirmative action plan for lieutenant, this occurred not because affirmative action in the CFD is interminable, but because the effects of prior discrimination continued to be felt.[5]

In any event, petitioners' claim that affirmative action in the CFD has exceeded proper remedial bounds accordingly raises, at best, an entirely fact-bound dispute that is subject to only limited review at this stage of the litigation. While petitioners accuse the CFD of "continuous overreaching" (Pet. 17), the district court found that the affirmative action plans served a proper remedial purpose, and that finding was sustained on appeal. See Pet. App. 6a. Findings of fact should be respected on appeal unless they are clearly

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[5] Petitioners' claim that Dr. Suchanek testified that affirmative action would be necessary until 2010 or 2015 (Pet. 8) is inaccurate. He testified that as of 1985, "closure" would take 15 to 20 years, predicated on a number of assumptions. Tr. 2290.

erroneous. See Fed. R. Civ. P. 52(a).[6] And this Court is especially reluctant to review factual findings that have already been sustained by a reviewing court. See, *e.g.*, *Exxon Co., U.S.A. v. Safee, Inc.*, 517 U.S. 830, 840-41 (1996); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Doe*, 465 U.S. 605, 614 (1984). Accordingly, petitioners' complaints about the duration of affirmative action are particularly inappropriate for plenary review. The fact-bound question whether the district court's findings on the duration of affirmative action in the CFD are supported by the record is of no general significance either.[7] For these reasons, petitioners' claim does not merit this Court's review.

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[6] The question whether a public employer has engaged in discrimination is an issue of fact that should be reviewed deferentially on appeal. See, *e.g.*, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985). Cf. *City of Pleasant Grove v. United States*, 479 U.S. 462, 469-70 (1987) (findings that municipality's proposed annexation were racially motivated are reviewed deferentially on appeal). Indeed, the circuits to consider the question have unanimously held that even under strict scrutiny, a district court's factual findings should be overturned only if clearly erroneous. See, *e.g.*, *Scott Construction Co. v. City of Jackson*, 199 F.3d 206, 211 (5th Cir. 1999); *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 903 (11th Cir. 1997), cert. denied, 523 U.S. 1004 (1998); *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996), cert. denied, 519 U.S. 1113 (1997).

[7] The fact-bound nature of this inquiry is illustrated by contrasting this case with those cited by petitioners. In *Middleton v. City of Flint*, 92 F.3d 396 (6th Cir.), cert. denied, 520 U.S. 1196 (1996), the affirmative action promotional plans at issue had lasted even after minority composition at the promotional rank had exceeded minority composition in the rank below. See *id.* at 411. Here, the district court found that in all the ranks at issue, minorities remained underrepresented at the higher rank as a result of prior discrimination when compared to minority representation in the ranks below. See Pet. App. 146a-52a, 154a-76a. In *Dallas Firefighters Association v. City of Dallas*, 150 F.3d 438 (5th Cir. 1998), cert. denied, 528 U.S. 1038 & 1046 (1999), the court concluded that affirmative action was unjustified when "[t]he record is devoid of proof of a history of

3. Petitioners make an even narrower and even more fact-bound argument when they attack the district court's reliance on Dr. Suchanek's testimony, accusing him of improperly presenting a "proportional hiring model" that assumes minorities should be hired and promoted in direct proportion to their representation in the outside workforce. See Pet. 20. But as we explain above, Dr. Suchanek did not advocate a "proportional hiring model," nor did the district court embrace such an approach. Instead, Dr. Suchanek's analysis accounted for the somewhat reduced minority interest in and qualification for employment with the CFD that he found. Accordingly, his model acknowledged that even in a nondiscriminatory system, minorities would have been hired and promoted by the CFD at somewhat lower rates than nonminorities. See Pet. App. 136a-43a.[8]

Petitioners also endeavor to impeach Dr. Suchanek's analysis by claiming that the results of a 1995 entry-level examination demonstrate that absent prior discrimination only

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egregious and pervasive discrimination or resistence to affirmative action that has warranted more serious measures in other cases." *Id.* at 411 (footnote omitted). Here, however, the district court found a pervasive history of discrimination that had produced enormous minority underrepresentation in the upper ranks of the CFD. See Pet. App. 129a-52a. Finally, in both *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994) (en banc), and *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525 (11th Cir. 1994), cert. denied, 514 U.S. 1065 (1995), the employer could have developed race-neutral mechanisms in order to ameliorate, if not eliminate, minority underrepresentation. See *Aiken*, 37 F.3d at 1164; *Birmingham*, 20 F.3d at 1546-47. Here, the district court found that no race-neutral alternative was available that could have redressed the continuing effects of prior discrimination. See Pet. App. 152a-54a.

[8] Petitioners are equally wrong to claim that the district court rejected Dr. Suchanek's testimony by utilizing a downward adjustment for the expected minority representation in each promotional rank. See Pet. 19. In fact, this was precisely the approach that Dr. Suchanek had taken in his testimony. See Pet. App. 137a-38a, 142a-43a.

20% of those hired by the CFD would have been minorities. See Pet. 20-21. But as the court of appeals correctly observed, petitioners produced no evidence that this examination adequately reflected what the rate of minority hiring would have been in earlier decades absent discrimination. See Pet. App. 5a-6a. Indeed, the evidence showed that the 1995 examination was of a different character from those used in prior years. In 1995, for the first time, the CFD created separate pools of "well qualified" and "qualified" candidates based on the examination results. *E.g.*, Tr. 2290. Moreover, petitioners' 20% figure is quite misleading in and of itself. That figure represents minority representation in the pool of those deemed "highly qualified" by that examination, but all those who received a score of "qualified" were eligible for employment. Indeed, we are informed that since the trial of this case was completed, the CFD nearly exhausted the "well qualified" pool, and accordingly will commence hiring from the "qualified" pool. And when the qualified pool is examined, it is consistent with Dr. Suchanek's analysis: minorities constituted 47% of the candidates found qualified under the 1995 examination (Def. Ex. 17-11), and the sustainable minority hiring rate identified by Dr. Suchanek and embraced by the district court was only 41-42%. See Tr. 1151-53; Def. Ex. 17-4 at 22. See also Pet. App. 137a-38a, 142a-43a. Thus, the rate at which minorities were found qualified by the 1995 entry-level examination did nothing to impeach Dr. Suchanek's analysis, which if anything is more conservative than warranted in light of the 1995 examination results.

In any event, petitioners make no effort to explain why their attacks on Dr. Suchanek's analysis merit plenary review. The soundness of the district court's reliance on Dr. Suchanek's testimony surely presents no question of general significance. And as we explain above, this Court is especially reluctant to review the findings of a district court

that have already been sustained on appeal, as the findings here have seen.

4. Petitioners briefly allude to the pendency of *Adarand* before this Court, suggesting that the decision in that case may somehow bear on this one. See Pet. 16 n.10. In fact, the issues raised here are wholly distinct from those raised in *Adarand*.

At issue in *Adarand* is whether the federal government may utilize contracting preferences for minority-owned businesses as a remedy for discrimination against such businesses in the private sector. See *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-76 (10th Cir. 2000), cert. granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 121 S. Ct. 1401 (2001) (No. 00-730). Whatever uncertainties may exist about the power of the government to remediate discrimination in the private sector through affirmative action, it is well settled that the Equal Protection Clause permits the use of affirmative action to remediate the government's own discrimination, as we explain above. And in any event, *Adarand* does not provide the Court with occasion to reexamine its precedents on that point.

For their part, petitioners suggest only that *Adarand* may bear on the arguments they advance relating to "the durational limits [of affirmative action] under strict scrutiny." Pet. 16 n.10. In fact, in *Adarand* the only argument made along those lines is a claim that the federal program at issue is of effectively unlimited duration because it lacks provisions for removing minority groups from contracting preferences once the effects of prior discrimination have dissipated. See Petitioners' Brief on the Merits at 47-49 (No. 00-730). Here, however, not only do the affirmative action plans expire by their own terms, but the district court's detailed findings demonstrate that all of the promotions at issue served a proper remedial purpose. There may well be many difficulties in reconciling a nationwide contracting program that does not

require an individualized finding that each preference it awards serves a remedial purpose with the dictates of strict scrutiny, but the application of strict scrutiny to employment cases such as this one is clear. When discrete promotions are at issue, the Constitution is satisfied where the promotions have been found to serve a proper remedial purpose, and affirmative action will "cease at the point at which the consequences of the past discrimination have substantially dissipated." Pet. App. 6a.

Petitioners appear to recognize that *Adarand* does not bear in any direct way on this case; even they do not ask that their petition be held until the decision in that case is announced. Nor is there any reason to do so. This massive litigation has remained pending long enough, generating enormous uncertainty in the careers of hundreds of CFD officials who might gain or lose promotions based on its outcome, and exposing Chicago's taxpayers to huge potential backpay liabilities. There is no basis for prolonging this litigation merely to await resolution of the wholly distinct issues before the Court in *Adarand*.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

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September 28, 2001

Supreme Court, U.S.
FILED
OCT 19 2001
OFFICE OF THE CLERK

No. 01-365

IN THE

Supreme Court of the United States

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RELPY BRIEF

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October 19, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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RELPY BRIEF

ARGUMENT

1. Respondent apparently considers its brief in opposition to be a cathartic exercise, because it devotes nearly half of its brief to *its own ignominious history of intentional discrimination*. Since the compelling interest prong of strict scrutiny is not at issue, Petition at pp. 3-4, Respondent's decision to set out that history "at some length," Brf. in Opp. at p. 5, means that its statement of the case is neither "concise" nor "material." S. Ct. Rules 15.3, 24.1(g). Moreover, the persistence of "racial policies" that caused the Chicago Fire Department to be "uncongenial" to blacks and Hispanics throughout Fire Commissioner Robert Quinn's 20 year tenure, Pet. App. 189a—Commissioner Quinn's reign came to an end in 1977, shortly after the death of his boyhood

friend and sponsor, Mayor Richard J. Daley, Pet. App 22a, Tr. 130, 2505-06—provide no justification, based on this Court's decisions, for promotional preferences enduring a quarter of a century later. *U.S. v. Paradise*, 480 U.S. 149, 178 (1987) (a race conscious remedy must be "ephemeral" in its "duration"); *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (prohibiting race conscious remedies that are "ageless in their reach into the past, and timeless in their ability to affect the future").

2. As to facts highly probative of the narrow tailoring issue Respondent stands mute. Hence, Respondent does not take issue with the fact that since 1985 all promotional exams administered in the CFD, including the six that are the subject of the Petition, have satisfied validation requirements of the uniform guidelines. Pet. App. 17a, 19a, 22a.[1] Nor does Respondent quarrel with the fact that it has favored African-Americans and Hispanics in awarding promotions continuously since 1987—and by the time of trial in 1997, Respondent had awarded 21% (224/1048) of all promotions in line with the race conscious preferences dictated by its affirmative action policy. Pet. App. 22a, 29a-34a, 43a-45a,

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[1] Respondent's assertion that promotional preferences only were awarded to minorities whose test scores "were within the same statistical range as the scores of nonminorities," Brf. in Opp. at pp. 2-5, is a non sequitur. Respondent's own experts admitted that even with score differentials as small as .01 (e.g., 90 compared to 89.99)—let alone the 12 point statistical range for scores on the 1994 engineer exam, Tr. 1672, 1677, 3490—there is a greater than 50% probability that the person with that higher test score will have higher job performance, making the higher score the "optical" predictor of performance. Tr. 1451, 1549, 1629, 1631, 1691, 3340, 3455; PX 51 at p. 32. The grouping or "banding" of test scores within a statistical range has absolutely no predictive value as far as job performance is concerned. *See,* 29 CFR §1607.14C(9) ("If . . . a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels."); *accord, Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

60a-62a, 73a-76a, 107a-109a. On the other hand, Respondent frankly admits that by 1987, when it began to take race and ethnicity into account in awarding promotions, "discriminatory barriers" to hiring had been "significantly reduced, *if not eliminated*." Brf. in Opp. at p. 10; italics added.[2] This concession, by itself, demonstrates that Respondent's preferential promotion policy is out-of-sync with *City of Richmond v. J.A. Croson,* 488 U.S. 469, 509 (1989), where Justice O'Connor, in her plurality opinion in Part V, opined that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary *to break down* patterns of deliberate exclusion." Italics added.

3. Respondent, however, considers its dutiful obedience to race neutral hiring and promotional practices, for 20 and 10 years, respectively (at the time of trial), to be of little import in gauging the duration of its policy of awarding preferential promotions to minorities. Brf. in Opp. at pp. 14-15. According to Respondent, the decisions of this Court lend no support whatsoever to Petitioner's argument that promotional preferences "endure only until a validated examination process was in place." Brf. in Opp. at p. 15. Petitioner's argument in that regard is, of course, derived from *U.S. v. Paradise*, where the Court upheld a 50% promotional quota, because of its "ephemeral" quality, *to wit*, the quota "*endures only until the Department comes up with a procedure that*

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[2] Those barriers fell when the hiring process became subject to the consent decrees that Respondent and DOJ entered into in the mid to late 1970s. Petition, ¶¶ 1, 5, at pp. 6-8; Pet. App. 23a. So Respondent's focus just on the minority hiring rate from 1985 onward, Brf. in Opp. at p. 10, as evidence of the elimination of hiring discrimination in the CFD, is far too narrow. While minorities accounted for 41.25% of the 1400 new hires in the 8 year period between 1985-92, minorities were similarly represented during the first 8 years of hiring under the consent decrees (1977-84) when 40% of the 1650 new hires were minorities. DX 17-30. And once hired minority firefighters and white firefighters had nearly identical attrition rates. Tr. 1154, 1215, 2937, 4609.

does not have a discriminatory impact on blacks . . ." 480 U.S. at 178; italics added. Respondent cannot bring itself to address what the Court in *Paradise* described as the "[m]ost significant[]" aspect of the race conscious remedy, i.e., its impermanence. *Id.*

4. Instead, and insidiously at that, Respondent cites *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), in support of its continuing use of racial and ethnic preferences, Brf. in Opp. at p. 15, basing that argument on the following quotation:

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. 515 U.S. at 237.

Respondent, however, chooses to ignore the next two sentences in Justice O'Connor's majority opinion in *Adarand*, which dispels any notion that the cited quotation is an endorsement of minority preferences, let alone preferences that endure without any foreseeable end in sight:

> As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. See *United States v. Paradise*, 480 U.S., at 167 (plurality opinion of Brennan, J.); *id.*, at 190 (STEVENS, J., concurring in judgment); *id.*, at 196 (O'CONNOR, J., dissenting). When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases. *Id.*

5. The "race-based remedy" that "*every* Justice of this Court agreed" upon in *Paradise*, was certainly not promo-

tional preferences. While the plurality in *Paradise*—Justices Brennan, Marshall, Blackmun, and Powell—approved of the 50% promotional quota, and then only until a non-discriminatory promotional exam was in place, the dissent—Justice O'Connor, joined by the Chief Justice, and Justices White and Scalia—rejected those preferences outright. 480 U.S at 178, 196-200. What makes Respondent's brief in opposition so disingenuous is that it eschews any reference to the particular species of affirmative action—racial and ethnic preferences—that has defined the CFD promotional process for nearly 15 years now, and substitutes in its place the generic term "affirmative action."[3]

6. In the end, however, Respondent's attempt to blur the fundamental differences between affirmative action that expands opportunities and affirmative action that relies on preferences, is too cute by half. This is demonstrated by Respondent's contention that Justice Scalia alone "has endorsed [Petitioners'] view that the government may *never*

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[3] "Affirmative action," a term that originated in Executive Order 11206 of 1964, requires federal contractors to take "positive steps . . . to ensure equal employment for traditionally disadvantaged groups." Office of Federal Contract Compliance EO 11246 Fact Sheet: <www.dol.gov/dol/esa/public regs/compliance/ofccp/fs11246.htm>. EO 11206 does not allow a contractor "to extend a preference" based on race, ethnicity, etc. 41 CFR § 60.2-16(e)(2). This type of affirmative action looks to the expansion of opportunities through, *inter alia*, outreach programs to widen the pool of minority applicants, training programs to upgrade the skills of workers, or, as Justice O'Connor's opined in *Paradise,* the development of a non-discriminatory promotion procedure. 480 U.S. at 200. The other type of affirmative action policy—manifested by Respondent's program that reserves promotions to minorities by an amount that is "20% over the African-American and Hispanic composition in the rank eligible for promotion," e.g., DX 5-2 at p. 1—is result oriented and predicated on fixed outcomes. In light of the Seventh Circuit' decision, that outcome will be attained only when the CFD workforce reflects the census based proportional hire model advocated by the City's expert. Pet. App. 3a-6a.

use affirmative action to redress the continuing effects of prior discrimination. *See*, *Adarand*, 515 U.S. at 239 . . ." Brf. in Opp. at p. 16, n. 3. Respondent can hardly be oblivious to the fact that it was Justice Scalia's first Term as a member of the Court when *Paradise* was decided. Hence, Justice Scalia was included in Justice O'Connor's observation that "every Justice of this Court agreed [in *Paradise*] that the Alabama Department of Public Safety's 'pervasive, systematic, and obstinate discriminatory conduct' justified a narrowly tailored race-based remedy." *Adarand*, 515 U.S. at 237. As Justice Scalia indicates in his concurrence in *Adarand*, it is the "concept of racial entitlement"—a/k/a racial preferences—that is constitutionally objectionable *at any time*, 515 U.S at 239, a view that is shared by Justice Thomas as well. *Adarand*, 515 U.S. at 240-42 (Thomas, J., concurring).

7. Despite the short-lived racial preference this Court affirmed in *Paradise*,[4] Respondent contends that there is "nothing remarkable about the affirmative action plans . . . here, even in terms of duration." Brf. in Opp. at 18-19. This statement alone should be reason enough to grant the writ, considering that racial preferences in promotions in the CFD have now been in effect for nearly 15 years. Moreover, despite Respondent's argument to the contrary, other circuits have not approved the type of preferential affirmative action programs that have lasted anywhere near as long as in the Chicago Fire Department. In *Majeske v. City of Chicago*, 218

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[4] Not only is *Paradise* the one and only occasion where the Court has let stand a racial preference as an affirmative action measure in the public sector, but Justice O'Connor's decision in *Croson* suggests that the pervasive and obstinate discriminatory conduct confronted in *Paradise* – where Justice O'Connor dissented to the use of racial preferences – would no longer be an acceptable justification for the use of racial preferences: either because *Paradise* was not an "extreme case," or because the other remedial steps in *Paradise*—especially the development of non-discriminatory promotional exams—sufficed "to break down patterns of deliberate exclusion." *Croson*, 488 U.S. at 509.

F.3d 816, 823-34 (7th Cir. 2000), the racial preferences in the Chicago Police Department were narrowly tailored because they were used for "one detective promotion" in 1990. In *Boston Police Superior Officers Fed v. City of Boston*, 147 F.3d 13, 23-25 (1st Cir. 1998), the affirmative action was "limited strictly to [a] single promotion," and the court took pains to point out that the Boston Police Department could not "depart from strict rank order in future promotions." *See also,* Petition at pp. 15-17.

8. Respondent's assurance that its preferential promotional policy will cease when "the consequences of the past discrimination have substantially dissipated," Brf. in Opp. at 19, is no more reliable than Respondent's promise in 1987 that affirmative action promotions to the rank of engineer would cease by 1990. Petition at pp. 6-7. Furthermore, in terms of duration, Respondent does not have a clue—and certainly does not venture a guess—when the time will come when past discrimination will have "substantially dissipated." Respondent now takes issue with its own expert's testimony on the question of duration—but for the wrong reason. Brf. in Opp. at p. 20 n. 5. Respondent points out that the prediction of Dr. Suchanek, that "closure"[5] would be reached 10 to 15 years hence—2010 to 2015—was "predicated on a number of assumptions." *Id.* Predictions are only as good as the underlying assumptions, and proportional hiring, the central assumption of the prediction that closure will occur in 2010 to 2015, has no basis in reality.

9. Instead of proportional hiring (57%), minority hiring reached its peak at 41% in the mid 1980s and has been dropping ever since. Petition at pp. 8-10, 19-21. The court of

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[5] By "closure" Dr. Suchanek was referring to that point in time when the minority composition of the CFD would be in proportion to the racial make-up of Chicago, and this census based proportional hire model was the key assumption used by Dr. Suchanek is giving the 10-15 year time frame. Tr. 2290-91; Pet. App. 136a-138a.

appeals, however, accepted the proportional hiring model as its benchmark for determining when past discrimination will have substantially dissipated. Pet. App. 6a. Since that benchmark is illusory, then we agree with Respondent that fixing the stopping point of 2010 or 2015 is "inaccurate"—if anything that time frame is an optimistic estimate. *See, U.S. v. City of Chicago,* 663 F.2d 1354, 1361(7th Cir. 1981) ("it puts the cart before the horse to maintain a high and inflexible quota for minority promotions while minority hiring proceeds under non-discriminatory procedures . . . at a much lower rate.").

CONCLUSION

For the foregoing reasons, and those set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 19, 2001